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Report of the Special Rapporteur on extreme poverty and human rights*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, prepared pursuant to Human Rights Council resolution 26/3. In the report, the Special Rapporteur argues that treating economic and social rights as human rights is essential both for efforts to eliminate extreme poverty and to ensure a balanced and credible approach in the field of human rights as a whole. He argues that economic and social rights currently remain marginal in most contexts, thus undermining the principle of the indivisibility of the two sets of rights.

Conventional wisdom celebrates the great strides that have been made in recent years in relation to economic and social rights. At the international level, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has been adopted, an impressive number of special procedures have been created to focus on these rights and bodies like the Human Rights Council spend much more time than they once did debating these issues. At the national level, economic and social rights proponents celebrate the impressive degree of constitutional recognition of some or most economic and social rights, the growing capacity of courts in many countries to enforce them, the growth of national non-governmental organizations working on economic and social rights and the emergence of a vibrant scholarly literature on the justiciability of those rights.

However, despite important recent progress, the reality is that economic and social rights remain largely invisible in the law and institutions of the great majority of States. In support of this proposition, the Special Rapporteur notes that: many of the States whose Constitutions recognize economic and social rights have not translated that recognition into a human rights-based legislative framework; the increasingly widespread constitutional

* The present report was submitted after the deadline in order to reflect the most recent developments.

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acceptance of the justiciability of economic and social rights contrasts with the resistance of many of the relevant courts to acting on these rights; many of the States that enjoy the world's highest living standards have specifically rejected proposals to recognize economic and social rights in legislative or constitutional form; most national-level institutional mechanisms for promoting human rights neglect economic and social rights; and national economic and social rights accountability mechanisms are generally much rarer than mainstream accounts would suggest.

The extent to which economic and social rights remain unacknowledged as human rights is the frequency with which debates about economic and social rights slide imperceptibly and almost naturally into broad discussions of development. But, in fact, development initiatives might not be rights-promoting, or even rights-protecting. In the report, the Special Rapporteur spells out why it matters that economic and social rights be treated as human rights and examines the ways in which this can be done by outlining the recognition, institutionalization and accountability (RIA) framework that focuses primary attention on ensuring recognition of the rights, institutional support for their promotion and accountability mechanisms for their implementation.

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I. Introduction

1. The present report is submitted in accordance with Human Rights Council resolution 26/3. It is the second report submitted to the Council by Philip Alston in his capacity as Special Rapporteur on extreme poverty and human rights.[1]

A. Paradoxical status of economic and social rights

2. Strategies to eliminate extreme poverty require efforts to promote the realization of all human rights, in accordance with the principle of the indivisibility of rights. While various reports submitted over the years by the Special Rapporteur have dealt with some of the civil and political rights dimensions of the equation, none has focused explicitly on the overall economic and social rights component, which is the focus of the present report. The present report is not typical of those presented to the Council. The former head of the Department of Peacekeeping Operations characterized United Nations reports as "painfully boring ... in which everything said is factually correct and yet where nothing really stimulates fresh thinking".[2] Clearly, factually correct reports are crucial, but reports which additionally stimulate fresh thinking are equally important, and the present one attempts to be both. The Special Rapporteur argues that, despite a great deal of diplomatic and expert activity on the issue of economic and social rights,[3] as well as an emerging body of case law and abundant scholarship, those rights nevertheless remain largely invisible in the law and institutions of the great majority of States.

3. This assessment sits most uneasily with the conventional wisdom that celebrates huge strides in recent years in relation to economic and social rights, including through their widespread constitutional recognition, and in the growing capacity of courts in many countries to enforce them. Thus, for example, it has been claimed that "the global language of human rights, and of economic and social rights in particular, pervades progressive politics around the world".[4] Those same authors describe how the demands of many different types of vulnerable and displaced communities are being pursued as judicial claims thanks to the opportunities opened up by the recognition of economic and social rights.

4. It is true that, in recent years, the process of including economic and social rights in constitutional provisions has proceeded apace, courts in a range of countries have generated some valuable case law, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has been adopted and some final Views have already been issued, special procedures have been created to deal with many of the economic, social and cultural rights, and international human rights bodies have devoted far more time to

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[1] The Special Rapporteur is very grateful to Christiaan van Veen and Varindarjit Singh for their excellent assistance with the report and to Gráinne de Búrca, Sandra Liebenberg and Nikki Reisch for their comments.

[2] Jean-Marie Guéhenno, *The Fog of Peace: A Memoir of International Peacekeeping in the 21st Century* (Washington, D.C., Brookings Institution Press, 2015), p. xiv.

[3] The present report focuses specifically on economic and social rights. While cultural rights are closely related to economic and social rights and are covered under the same Covenant, they also have a number of distinctive characteristics that warrant a somewhat different approach than the one adopted here.

[4] Daniel M. Brinks, Varun Gauri and Kyle Shen, "Social rights constitutionalism: negotiating the tension between the universal and the particular", *Annual Review of Law and Social Science*, vol. 11 (November 2015), pp. 289-290.

debating such rights than they once did. But there remains a fundamental paradox because, at the same time:

(a) Many of the States whose Constitutions recognize economic and social rights have not translated that recognition into a human rights-based legislative framework;

(b) The increasingly widespread constitutional acceptance of the justiciability of economic and social rights stands in direct contrast to the resistance of many of the relevant courts to acting on these rights;

(c) Many of the States that enjoy the world's highest living standards have specifically rejected proposals to recognize economic and social rights in legislative or constitutional form;

(d) With few exceptions, the principal national-level institutional mechanisms for promoting human rights devote almost no attention to economic and social rights;

(e) National economic and social rights accountability mechanisms are generally much rarer than mainstream accounts would suggest.

5. The paradox is deepened by the fact that, at the international level in particular, both intergovernmental bodies and civil society actors continue to generate detailed and lengthy interpretations of economic and social rights provisions (especially through general comments and general recommendations), as well as principles, guidelines, recommendations, handbooks, guiding principles, manuals and blueprints designed to help Governments and other actors to better understand the nature and scope of States' economic and social rights obligations. While this impressive and enlightening output has greatly strengthened the ability of civil society actors to advocate more effectively for economic and social rights, the question is whether, in national contexts in which economic and social rights do not enjoy legislative recognition, where national institutions do not effectively monitor and promote such rights and where meaningful accountability and participation mechanisms have not been established, conditions are such that a meaningful governmental response is likely to be triggered. The anticipated response to this critique is that the main, or at least initial, targets of the new activism are civil society actors and that they can be aided, empowered and even mobilized despite governmental inaction. But this response would be disingenuous if it implies that civil society actors alone can bring about the deep societal change that is required if economic and social rights are to be taken seriously as human rights.[5]

6. At the end of the day, the most telling evidence of the extent to which economic and social rights remain unacknowledged as human rights is the frequency with which debates about them slide imperceptibly and almost naturally into broad discussions of development. States challenged to explain how they respect economic and social rights will describe general development or social welfare initiatives as though they are necessarily synonymous with such rights. And development cooperation budgets often assume that, as long as an equality or poverty alleviation dimension is included, a project can be considered as promoting economic and social rights. But, in fact, development initiatives might not be rights-promoting or even rights-protecting, and even when they are both, they may well end up promoting the special interests of a targeted group rather than economic and social rights as human rights.

7. The risk of eliding two potentially very different approaches also arises when the 2030 Agenda for Sustainable Development and its Sustainable Development Goals is automatically equated with the promotion of respect for economic and social rights. While

[5] Marc Verdussen, ed., *Les droits culturels et sociaux des plus défavorisés* (Bruxelles, Bruylant, 2009).

it is very much to be hoped that the 2030 Agenda will indeed lead to greater respect for economic and social rights as human rights, this is by no means guaranteed by the terms of the Agenda as adopted and much remains to be done if that aspiration is to be meaningfully promoted.

B. Treating economic and social rights as human rights

8. This report emphasizes the importance of treating economic and social rights as human rights, rather than as desirable goals, development challenges, social justice concerns or any of the other formulations that are invariably preferred. The pre-eminent question is whether it really matters that we treat economic and social rights as human rights. One answer is that the use of rights terminology is avoided so assiduously by governments and others precisely because it does matter very much and makes a big difference. How so? First, the use of the human rights framework ensures that in the midst of programmes designed to ensure collective well-being, the rights of the individual and not just the overall goals of the programme and the interests of the collectivity are taken into account. Second, in contrast to generic social justice language which has no defined content or agreed meaning, human rights discourse directs policymakers and others back to the internationally agreed formulations of economic and social rights and the jurisprudence that has painstakingly evolved. Third, treating economic and social rights as human rights rather than long-term goals introduces an element of immediate salience which might otherwise not be present. Fourth, and perhaps most importantly, the language of rights recognizes and insists on the dignity and agency of all individuals (regardless of race, gender, social status, age, disability or any other distinguishing factor) and it is intentionally empowering. Whether in the home, village, school or workplace, or in the political marketplace of ideas, it makes a difference if one is calling for the realization of collectively agreed and internationally recognized and defined rights to housing or education, rather than merely making a general request or demand. Moreover, as noted earlier, the legal conception of human rights presupposes and demands accountability, whereas characterizing economic and social rights in terms of desirable goals or development challenges leaves them hostage to a great many other considerations.

C. Structure of the report

9. In the present report, the Special Rapporteur identifies the problematic consequences that flow from the second-tier status of economic and social rights within both the domestic and international human rights systems. He then reflects on the ways in which economic and social rights can be treated as though they really are human rights and what that would mean. He does this primarily through the lens of the recognition, institutionalization and accountability (RIA) framework. These are the three essential components of any potentially effective strategy for promoting economic and social rights as human rights, and policies and programmes that neglect these dimensions are unlikely to be effective. Consideration is given to the extent to which the framework is reflected in some of the monitoring activities undertaken by the Human Rights Council, the Committee on Economic, Social and Cultural Rights and international non-governmental organizations (NGOs). The Special Rapporteur concludes the report by noting that the RIA framework is not a magic bullet, nor should it be seen as a substitute for other initiatives in the field, and highlighting the need to acknowledge and tackle the deeper reasons for the continuing marginalization of economic and social rights.

II. Consequences of neglecting economic and social rights

10. During the Cold War years, deep ideological divisions ensured that economic and social rights were given very limited attention. It was not until 1987 that the Committee on Economic, Social and Cultural Rights was established by the Economic and Social Council, a development that certainly helped to trigger considerable progress. Partly as a result, 171 States proclaimed at the World Conference on Human Rights in 1993 that:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.[6]

11. In addition to highlighting the intrinsic linkages among all rights, the principal significance of this bold assertion was to signal that economic, social and cultural rights are as important as civil and political rights and *must* be accorded equal attention. And the past quarter of a century has indeed seen a great number of important initiatives, especially in sectoral areas such as the right to housing, the right to food, the right to health and the right to water, and more consistent tribute being rendered to the principle of indivisibility. But acceptance in law and in practice of the idea that economic and social rights are actually human rights, with the set of clear legal consequences that this entails, rather than a set of concerns synonymous with development or social progress, remains marginal. This marginality manifests itself in the work of United Nations human rights bodies, in both the theory and practice of the great majority of States, in the work of many of the most prominent civil society groups focusing on human rights, in the interests and priorities of scholars and commentators and, perhaps most counter-intuitively, even in the work of most international agencies promoting poverty alleviation and social development. As a result, the principal of indivisibility continues to be honoured more in the breach than in the observance.

12. Some will contest this assessment, while others will suggest that the difference in attention and in the practical legal recognition accorded to the two sets of rights — civil and political rights on one hand, and economic, social and cultural rights on the other — does not really matter. In fact, it matters a great deal, and for a number of reasons. The most basic is philosophical, in the sense that it is agreed that the two sets of rights are indispensable elements in enabling individuals to live dignified and fulfilling lives. It is also important for doctrinal reasons. The equal status of the rights recognized in the Universal Declaration of Human Rights reflects a hard-fought ideological and political compromise, not only between capitalist and communist approaches in the 1940s, but between continuing differences in perception over what societies should value most and the terms of the social contract between the State and its inhabitants. It is the glue that has held the package together and the understanding that enables the reconciliation of otherwise starkly competing visions. It reflects the need to achieve an equilibrium among goals that will inevitably always be in tension with one another. Whether the equal importance of the two sets of rights can also be demonstrated empirically is a matter over which economists and others have long duelled, and instrumentalist arguments continue to be heavily relied upon in making the case for goals such as gender equality. But, regardless of the conclusions that might emerge from such research, the validity of the underlying principle cannot be held hostage to the uncertainties of empirical analyses.

13. The widespread persistence of extreme poverty, despite the progress made in recent years, serves to highlight the central importance of the struggle to achieve economic and

[6] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

social rights. Many hundreds of millions of people continue to suffer from extreme poverty, and by no means only in the poorest countries, in what is a grave affront to any notion of universal human rights. While such poverty is a phenomenon that fundamentally undermines most, if not all, civil and political rights, its most obvious and brutal manifestation is in the premature deaths and severely deprived lives that result from the denial of economic and social rights. While it is true that many developed and a few developing States have radically diminished extreme poverty without adopting a strategy based on the recognition of economic and social rights, experience more broadly suggests that the failure to take those rights seriously diminishes the prospects for eliminating extreme poverty, even in contexts where overall economic growth levels are high.

14. It is not just the world's poorest citizens who are at risk. The capitalist system, which has become the dominant global economic system, is "a tremendously powerful system ... in terms of sheer productivity, innovation and dynamism", but it is ultimately unsustainable unless the excesses and predations that are built into the way it functions are tempered by systems that ensure the basic welfare of the many who would otherwise be victims of the "uncertainty, instability and anti-social effects generated by capitalist processes".[7]

15. Economic and social rights are also of central importance to efforts to tackle extreme inequality and its consequences. The thoroughly documented increases in global wealth and income inequality threaten to undermine the social fabric, to turn civil and political rights into a tool that will be used predominantly to protect the rights and interests of the wealthy and to entrench forms of economic and political liberalism that ignore the needs and deny the rights of those living in poverty. In many respects, the approach currently taken by the international human rights system all but ensures the worst of all possible outcomes. On the one hand, the correct approach insists that economic and social rights are indivisible from, and of equal importance to, civil and political rights, thus suggesting that they can provide a meaningful response to extreme poverty, extreme inequality and other forms of rampant social injustice. On the other hand, the international human rights system systematically marginalizes those rights in many respects, and tolerates a situation in which the majority of States avoid the recognition, institutionalization and accountability that alone can establish solid foundations upon which to build respect for economic and social rights as full-fledged human rights and thus provide powerful and principled arguments to reduce levels of inequality.

16. More sustained and meaningful attention to economic and social rights is also increasingly recognized as an indispensable component of effective and comprehensive counter-terrorism strategies in many contexts. The Special Rapporteur on the promotion and protection of human rights while countering terrorism has consistently drawn attention to the extent to which societies characterized by economic, social, political and educational exclusion are often breeding, or recruitment, grounds for terrorism.[8] And the Secretary-General included in his Plan of Action to Prevent Violent Extremism a lack of socioeconomic opportunities, as well as marginalization and discrimination, among the conditions conducive to violent extremism.[9]

17. A strong case is also to be made for attributing the resurgence of right-wing populism, at least in some of the many countries in which it is occurring, to the growth of inequality and the widespread neglect or denial of economic and social rights.

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[7] For a powerful argument to this effect, see David Garland, *The Welfare State: A Very Short Introduction* (Oxford, Oxford University Press, 2016), p. 137.

[8] See A/HRC/20/14, para. 31; also A/HRC/6/17, para. 64

[9] See A/70/674, paras. 24-26.

18. There is also the question of the legitimacy of the overall human rights enterprise. The economic and social rights framework is increasingly portrayed by critics as being toothless and ineffectual and bringing small or no returns in terms of social justice. Based on such critiques, commentators have argued that only a radically different, non-human rights-based, language could meaningfully address these challenges, that economic and social rights mandates are diverting resources away from the rights that matter, that only political parties and social movements and not human rights groups have the potential to achieve social justice objectives, and that free markets and private enterprise hold the key to economic and social rights in the wake of clear governmental failures in this domain.

19. Closely linked to this loss of legitimacy is a loss of credibility in the eyes of rights holders. The second-class status of economic and social rights has deeply negative consequences for the potential of the human rights movement to gain the widespread support that it needs in order to establish its credibility in the eyes of the literally billions of people whose fundamental needs continue to be of only minor relevance to the core human rights agenda. The fact that the movement is subject to powerful challenges at the global level is due in significant part to the perception that its overriding preoccupations do little or nothing to address the most abiding and pressing challenges confronted by a large part of humanity.

III. Understanding and acting upon States' economic and social rights obligations

20. States' obligations under human rights treaties are described in different ways in different treaties. In civil and political rights contexts, the obligation is to respect and to ensure, whereas economic, social and cultural rights standards reflect an obligation to recognize the rights and take steps to realize them progressively. In spelling out those obligations, international bodies and commentators have commonly identified duties to protect, respect and fulfil.

21. However, in the 50 years since the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted, extensive experience has been gained at both the international and national level, which enables us to identify the key ingredients in successful approaches to the recognition and implementation of human rights obligations. Three are of particular salience in relation to economic and social rights: (a) the need to accord legal recognition to the rights; (b) the need for appropriate institutional arrangements to promote and facilitate realization of the rights; and (c) the need for measures that promote governmental accountability. This can be termed the recognition, institutionalization and accountability framework, or the RIA framework, and its implications for economic and social rights are considered below.

A. Legal recognition

22. The International Covenant on Economic, Social and Cultural Rights contains three principal types of obligation. The first, and the most consistently ignored or underestimated, is the obligation to recognize each of the particular rights. The second is to take steps through all appropriate means, including particularly the adoption of legislative measures. The third is the obligation to "guarantee" the exercise of the relevant rights without discrimination.

23. In terms of the obligation to recognize, the Committee on Economic, Social and Cultural Rights has noted that, in many instances, legislation is highly desirable and in some cases may even be indispensable.[10] It subsequently added that, although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.[11]

24. Much of the literature on economic and social rights has focused on the extent to which these rights have actually been recognized not in legislation, but through constitutional entrenchment, which is consistently assumed to be a far more significant step. While that is important, it has not been considered by the Committee to be an indispensable element, especially because of the great variety of State constitutional traditions and approaches. In any event, constitutional recognition will generally need to be supplemented by legislation. The question that then arises is, under what circumstances would legislation not be required? In part the answer will depend on the legal system in question, so that a State that makes extensive use of decrees or regulations or some other form of instrument that is not considered to be legislative in nature might be able to demonstrate that it meets the legal recognition requirement in an appropriately formal and legally meaningful way, even in the absence of legislation. But such cases are likely to be relatively rare.

25. In the light of what appears to be the relatively common State practice of not giving explicit legislative recognition to individual economic and social rights, the most important question is whether legislation, or an equivalent form of legal instrument, can be dispensed with altogether by a State that claims to be fulfilling its obligations through other means. In practice, the argument will usually be that legislation has been adopted in relation to the issue or sector in question, and it is unnecessary for any reference to be made in that legislation to the relevant human right. In other words, to take the example of the right to food, the argument would be that it is sufficient that there is legislation in place that addresses food safety or food security, even though it reflects no explicit rights dimension. Or, in the case of the right to education, laws dealing with the establishment of educational institutions are considered sufficient, even if there is no acknowledgement that education is a human right.

26. In support of the view that specific recognition is not required, it might be argued that if a treaty envisages such recognition, it would say so explicitly. Thus treaties dealing with torture, genocide, war crimes or crimes against humanity call not just for legislative recognition of the norm, but also for explicit criminalization of particular conduct. The Convention on the Elimination of All Forms of Discrimination against Women unequivocally requires States parties "to embody the principle of the equality of men and women in their national constitutions or other appropriate legislation" (art. 2 (a)). It further obliges them "to ensure, through law and other appropriate means, the practical realization of this principle."

27. Nonetheless, aside from the clear position that the relevant Committee has taken in its general comments, it is difficult to understand how the obligations to "recognize" the rights, and to "guarantee" non-discrimination, could possibly be achieved in the absence of targeted legislative or equivalent measures. As stated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, the general

[10] See the Committee's general comment No. 3 (1990) on the nature of States parties' obligations, para. 3.

[11] See general comment No. 9 (1998) on the domestic application of the Covenant, para. 5.

principle is that States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by, inter alia, incorporating norms of international human rights law into their domestic law, or otherwise implementing them in their domestic legal system.[12] The key element here is the recognition of the norm itself, not merely the adoption of measures that are pertinent to the subject-matter of the norm.

B. Obligation to establish institutions

28. Human rights are often expressed with great brevity and little or no elaboration as to their content or corresponding obligations. The relevant treaties simply recognize that there is a right to life, a right to social security or a right to recognition as a person before the law. But the assumption underpinning this approach is that institutions will be created and will help to develop the normative content of the relevant right, promote its implementation and facilitate its realization. In Spanish, the term *institucionalidad* is sometimes used to denote the institutional arrangements that are needed to underpin the rule of law and human rights. Where no institutions are designated to take the lead in implementing a particular human right, the likelihood is that little will be done to treat it as a human right per se. This is especially the case in relation to economic and social rights.

C. Obligation to promote accountability

29. The principle of accountability provides the overarching rationale for the establishment of an international human rights regime. It operates at two levels. One involves State accountability to the international community, which has been promoted through the creation of monitoring mechanisms such as the Committee on Economic, Social and Cultural Rights and the universal periodic review process, and through regional mechanisms. The other involves ensuring that governments are accountable to their citizens and other rights holders. The right to a remedy is recognized in the Universal Declaration of Human Rights and international human rights law has attached particular importance to developing an understanding of the right to adequate, effective, prompt and appropriate remedies, including reparations. Remedies have also been highlighted in transitional justice contexts. In relation to economic, social and cultural rights, the Committee on those rights has stated in its general comment No. 9 that "appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place" (para. 2).

IV. Applying these obligations to economic and social rights

30. In recent years, there has been great progress in the attention devoted, at both the national and international levels, to economic and social rights. In terms of scholarship, a "renaissance" of economic and social rights is said to have occurred, leading to a "burgeoning" literature.[13] In terms of legal developments, a typical account noted as follows:

> ESC rights have gained increased acceptance in international law and comparative jurisprudence. This is evident in an array of new treaties and resolutions and the

[12] See General Assembly resolution 60/147, annex, para. 2.

[13] Courtney Jung, Ran Hirschl and Evan Rosevear, "Economic and social rights in national constitutions", *American Journal of Comparative Law*, vol. 62, No. 4 (December 2014), p. 1043.

adoption of international complaint mechanisms that cover ESC rights…. This has been accompanied by a rise in regional and national adjudication of ESC rights.[14]

31. Another very positive account argues that "the broad normative framework of ESC rights has attained a high degree of specificity in terms of content as well as efficacy of implementation mechanisms, most importantly at the national level".[15]

32. However, any assessment of progress made needs to begin by acknowledging that the starting point was one of essential neglect. The key question is thus not quantitative, but qualitative, in nature. Have the many developments led to economic and social rights being taken seriously in the actual practice of governments and other major actors, and have the foundations been laid for continuing strength in the future? This is where the RIA framework is central. In the next section, consideration is given to how much progress has been made at the national level in relation to each of the three dimensions of recognition, institutionalization and accountability.

A. Legal recognition

33. It has been suggested that "countries are choosing social rights constitutionalism over other ways to promote well-being and the fulfilment of basic human needs".[16] A systematic and detailed study of economic and social rights in national constitutions provides detailed evidence to support this optimistic assessment; 195 constitutions were examined with a view to identifying which of 16 separate economic and social rights were recognized and, where they were recognized, whether the constitutions classified them as justiciable or aspirational (such as directive principles of State policy). Over 90 per cent of the Constitutions recognized at least one economic and social right. In around 70 per cent of the Constitutions, at least one economic and social right was explicitly justiciable and around 25 per cent of them recognized 10 or more justiciable economic and social rights. In order of frequency, the justiciable rights concerned education, trade unions, health care, social security, child protection and environmental protection. The study found that those six rights appear in over half of all Constitutions.[17]

34. While the present report cannot do justice to the richness of these survey findings, it is clear that impressive levels of constitutional recognition have been achieved and that many more economic and social rights are considered to be justiciable, and in many more countries, than was previously thought to be the case. However, if it turns out that the practical consequences of such constitutional recognition have been very limited, there would be much less to celebrate and attention would need to be focused on supplementary or alternative approaches. Thus an assessment of the significance of these findings requires a careful examination of the empirical consequences of constitutional recognition in terms of enhanced accountability and improved levels of realization of economic and social

[14] Malcolm Langford and others, "Introduction – An emerging field," in *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Malcolm Langford and others, eds. (Cambridge, United Kingdom, Cambridge University Press, 2014), p. 7.

[15] Eibe Riedel, Gilles Giacca and Christophe Golay, "Introduction – The development of economic, social and cultural rights in international law," in *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, Eibe Riedel, Gilles Giacca and Christophe Golay, eds. (Oxford, Oxford University Press, 2014), p. 3. See also Gregor T. Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Zurich, Schulthess Verlag, 2014).

[16] Brinks, Gauri and Shen, "Social rights constitutionalism" (see footnote 4), p. 291.

[17] Jung, Hirschl and Rosevear, "Economic and social rights in national constitutio..s" (see footnote 13), p. 1053.

rights. The main challenges in this regard are considered in the section below on accountability.

35. Although the topic cannot be dealt with in the present report, it should also be noted that the constitutional recognition of economic and social rights may well be overshadowed or undermined by parallel and far more effective processes involving the constitutional and legal enshrinement of austerity measures.[18] This refers primarily to the use of regional integration, bilateral and multilateral trade and investment agreements, or international financing arrangements, to privilege competing interests that effectively trump human rights considerations.

B. Institutionalization

36. In terms of institutions for the promotion of economic and social rights, scholars and others have focused almost all of their attention in recent years on courts. The impact of courts will be examined below, under the rubric of accountability. Judicial enforcement is not the same, however, as institutional promotion. The courts are not equipped, and are understandably not willing, to perform the roles required to promote the deeper understanding of economic and social rights and their implementation by diverse governmental and other agencies.

37. In considering which institutions are most likely to be best placed to promote knowledge and understanding of economic and social rights at the domestic level, two types of actors seem most relevant. The first being the government agencies that are responsible for making and implementing policy in the relevant sectors. Thus, government ministries dealing with education, social protection, health, nutrition and so on might be expected to take the lead in promoting a rights-based understanding. This is not to argue, as is sometimes suggested in the literature on rights-based approaches to development, that everything these ministries do should be guided by and seen through the lens of human rights.[19] Nonetheless, one might expect the ministry of education, for example, to acknowledge that there is a right to education and to spell out what that means in specific policy terms. While it is well beyond the scope of this report to explore how common such an approach is among sectoral ministries in most countries, it can be said by way of generalization that the phenomenon is not common. There are some indications that the health sector might be moving more in that direction under the impetus of the movement for universal health coverage. Similarly, social security is increasingly seen in terms of the right to social security as a result of the Social Protection Floor Initiative.

38. The second type of institutional actor that could be expected to play a key role in promoting economic and social rights is national human rights institutions, of which there are now almost 120. In 1998, the Committee on Economic, Social and Cultural Rights called upon national human rights institutions to take a more active role in the promotion of economic and social rights.[20] The most detailed scholarly study of those institutions yet

[18] Stephen McBride, "Constitutionalizing austerity: taking the public out of public policy", *Global Policy*, vol. 7, No. 1 (February 2016), p. 5.

[19] For a powerful but nuanced argument as to how a country's national health system "enshrines and communicates values in the overall society and is not merely a technical apparatus for the delivery of goods and services", see Alicia Ely Yamin, *Power, Suffering and the Struggle for Dignity: Human Rights Frameworks for Health and Why They Matter* (Philadelphia, University of Pennsylvania Press, 2016), p. 236.

[20] See the Committee's general comment No. 10 (1998) on the role of national human rights institutions in the protection of economic, social and cultural rights.

undertaken concludes that, if they "can be faulted as a group for one thing, it is an insufficient challenge to the material conditions that perpetuate human rights violations".[21] Specialist studies indicate that while a handful of such institutions have devoted significant attention to economic and social rights,[22] the vast majority have not. The reasons cited include absent or restrictive mandates, lack of expertise, lack of resources, absence of political support and the complexity of the issues. The bottom line is that few of these "institutions are producing regular, comprehensive reports on ESC rights fulfilment in their countries".[23]

39. A key factor in explaining this fundamentally unbalanced approach may be the relative absence in the work of many national human rights institutions of genuinely consultative approaches that would enable the affected communities to influence priorities and approaches and participate in developing policy responses and recommendations.

C. Accountability

40. Many books have now been written extolling the virtues of involvement by the courts in enforcing economic and social rights in various countries around the world, but justiciability is by no means the whole story. Indeed, it might be argued that the focus on justiciability has become the tail that is wagging the analytical dog. Rights holders can seek accountability through many means, including: (a) sharing information with the media; (b) using community or peer pressure; (c) collecting and publishing data; (d) complaining to an authoritative body or person; and (e) evaluating and reporting.[24] However, most of these methods assume that, at the end of the day, there will be a mechanism in place to which the claim can ultimately be brought for vindication in the absence of self-correction by the duty holder.[25]

41. All three branches of government offer potential accountability mechanisms for economic and social rights claims. The legislature is, of course, central in terms of its ability to adopt legislation that mandates attention to such rights or that responds to violations. There have also been important initiatives in terms of establishing parliamentary human rights committees and institutionalizing review of draft legislation to ensure compliance with human rights law. In terms of the executive, government officials can monitor economic and social rights realization and incorporate those rights into policymaking and implementation mechanisms. State agencies are also often a logical locus for complaints mechanisms, although they remain strongly underresearched in the economic and social rights field. While national human rights institutions are potentially

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[21] Sonia Cardenas, *Chains of Justice: The Global Rise of State Institutions for Human Rights* (Philadelphia, University of Pennsylvania Press, 2014), p. 360.

[22] See Asia Pacific Forum for National Human Rights Institutions and the Center for Economic and Social Rights, *Defending Dignity: A Manual for National Human Rights Institutions on Monitoring Economic, Social and Cultural Rights* (January 2015); and Eva Brems, Gauthier de Beco, Wouter Vandenhole, eds., *National Human Rights Institutions and Economic, Social and Cultural Rights* (Mortsel, Belgium, Intersentia, 2013).

[23] Alison Corkery and Duncan Wilson, "Building bridges: national human rights institutions and economic, social and cultural rights", in *Economic, Social and Cultural Rights in International Law* (see footnote 15), pp. 473-490.

[24] United Nations Children's Fund, *Accountability for Children's Rights: A research mapping of local and informal accountability mechanisms* (December 2015), p. 7, available at www.unicef.org/policyanalysis/rights/files/ACR-SPREADS-WEBFILE.pdf.

[25] Varun Gauri, "Redressing grievances and complaints regarding basic service delivery", *World Development*, vol. 41 (January 2013), p. 109.

relevant, studies indicate that they have played a very minor role, not just in terms of economic and social rights promotion, as noted above, but also in achieving accountability. The main exception in that regard relates to the role of ombuds institutions, which could be much more engaged on matters of economic and social rights than they are, even though their powers generally fall short of being able to provide direct remedies.

42. Because of the relative inactivity of these other actors, studies of economic and social rights accountability have focused overwhelmingly on the courts and on the extent to which the increasing constitutional recognition noted above has enabled them to play an active role in upholding economic and social rights. It is open to question whether this emphasis accurately reflects the main trends in economic and social rights accountability or whether it is due more to the lawyers' preference for studying courts. It might also be linked to the determination of economic and social rights proponents in the era of post-Cold War constitutional revitalization to respond to the often heard, but highly reductionist, proposition that "if one is to talk meaningfully of rights, one has to discuss what can be enforced through the judicial process".[26] In response, economic and social rights proponents have sought legitimacy by seeking to demonstrate that economic and social rights resemble civil and political rights, at least in this key respect.

43. In the limited space available in the present report, it is impossible to undertake a systematic review of the experience, to date, with justiciability, but some broad conclusions emerge from the voluminous and often excellent literature.[27]

44. First, constitutional recognition on its own means relatively little in practical terms. Hence the distinction drawn by Katharine Young between constitutionalizing and constituting economic and social rights, according to which the latter goes well beyond constitutional recognition, to require that the rights are actually effective within the legal system.[28] For example, a study on the right to health in Africa begins by celebrating the fact that "from Africa to Asia, Europe and even South America, cases relating to the violation of the right to health are constantly being brought before the courts".[29] Yet, in the study it is shown that, in the African context, South Africa is the only country in which there has been systematic litigation of this sort. Malcolm Langford was correct when he observed that, "the scope for formal judicial review of ESC rights is rather limited outside the use of civil rights or international mechanisms".[30]

45. Second, even when economic and social rights are both constitutionally recognized and justiciable, there are many factors that can limit the resulting outcomes. Lawyers might

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[26] Aryeh Neier, "Social and economic rights: a critique", *Human Rights Brief*, vol. 13, No. 2 (2006), p. 1.

[27] Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge, United Kingdom, Cambridge University Press, 2008); Colleen M. Flood and Aeyal Gross, eds., *The Right to Health at the Public/Private Divide: A Global Comparative Study* (Cambridge, United Kingdom, Cambridge University Press, 2014); Alicia Ely Yamin and Siri Gloppen, eds., *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge, Massachusetts, Harvard University Press, 2011); Diane Roman, "La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social", *La Revue des Droits de l'Homme*, vol. 1 (2012), available at http://revdh.revues.org/635.

[28] Katharine G. Young, *Constituting Economic and Social Rights* (Oxford, Oxford University Press, 2012), p. 6.

[29] Ebenezer Durojaye, "Introduction – The relevance of health rights litigation in Africa", in *Litigating the Right to Health in Africa: Challenges and Prospects*, Ebenezer Durojaye, ed. (London, Routledge, 2015).

[30] Malcolm Langford, "Judicial review in national courts: recognition and responsiveness", in *Economic, Social and Cultural Rights in International Law* (see footnote 15), p. 423.

not invoke such rights, a lack of resources and the absence of legal aid might make it impossible for many violations of economic and social rights to be litigated and potential applicants might be denied standing to sue. Even when cases get to court, the judiciary might not be independent, the judicial culture might not be amenable to scrutinizing the sort of issues raised by economic and social rights and the remedies available might be so weak as to deter such litigation.

46. Third, the literature does not pay much attention to the existence of implementing legislation designed to promote realization of a specific right as a human right, whether or not there is constitutional recognition. In countries like South Africa, there is very extensive legislation (such as the Water Services Act, 1997) designed to promote or implement economic and social rights and this often plays a key role in constitutional litigation. But in most other countries, such legislation seems to be rare, certainly outside of the education and health sectors.

47. Fourth, although some of the databases of economic and social rights case law around the world are impressive, the total number of cases is still rather limited. While individual cases have arisen in many jurisdictions, the reality is that in only a handful of jurisdictions have the courts generated a body of significant case law. Among the most notable of these are Colombia, India, Kenya, South Africa and state-level courts in the United States of America (in relation to the right to education).

48. Fifth, the implementation of positive judicial outcomes and the search for more creative remedies have been "an analytical and practical blind spot".[31]

V. International monitoring of economic and social rights recognition, institutionalization and accountability

49. In monitoring civil and political rights, both the Human Rights Council and the treaty bodies have played a crucial role in encouraging States to focus on the recognition, institutionalization and accountability dimensions of those rights. It is much less clear, however, that they have played a comparable role in relation to economic and social rights. While the Council addresses economic and social rights in many different contexts, and especially through the work of its special procedures, perhaps the best indication of its approach can be gleaned from the universal periodic review process. In terms of the work of the treaty bodies, the most important in this context is the Committee on Economic, Social and Cultural Rights. The approach adopted with regard to recognition, institutionalization and accountability in each of these settings is examined briefly below.

A. Universal periodic review

50. Because of its universality and its integrated approach to the human rights agenda, the universal periodic review process is an especially important indicator of governmental concerns and priorities. A thorough review of the operation of the process since its inception raises concern about both the quantity and quality of economic, social and cultural rights-related recommendations. Only one out of five recommendations adopted have been specifically concerned with economic, social and cultural rights. Only 11 per cent of the recommendations put forward by the regional group that have made, by far, the

[31] César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge, United Kingdom, Cambridge University Press, 2015), p. 8.

most recommendations overall dealt with economic, social and cultural rights. For other regions, the figures were 20 to 30 per cent. Even more problematic, two thirds of the recommendations relating to economic, social and cultural rights called for only general action, as opposed to any specific outcome.[32] These results are consistent with the Special Rapporteur's own survey, which indicated that up and including the twenty-second session of the Human Rights Council, 1,031 economic and social rights-related recommendations had been made. Of these, over 20 per cent called for ratification of the Covenant or the Optional Protocol, or withdrawal of reservations made at the time of ratification. Thirty-three recommendations called for greater cooperation with United Nations bodies working on economic, social and cultural rights; 182 called for legislative action on one or more specific economic and social rights, but almost none of these focused on specific legislative recognition of economic and social rights as human rights. Only 13, or 1.26 per cent, of the relevant recommendations specifically requested a State to take measures to guarantee the status of economic, social and cultural rights through constitutional amendments, enactment of legislation or by giving national courts jurisdiction to provide remedies for economic and social rights violations.

51. The main conclusion to be drawn for the purposes of the present report is that, insofar as the universal periodic review is an accurate indicator, States attach very limited importance to the recognition, institutionalization and accountability dimensions of economic and social rights.

B. Committee on Economic, Social and Cultural Rights

52. The Special Rapporteur has surveyed the Committee's work since the beginning of 2014 to evaluate how it has approached the three elements in the RIA framework. This included State party reports, the relevant lists of issues and the concluding observations relating to 32 States parties, drawn more or less evenly from the different regional groups.

53. In one third of the 32 lists of issues considered, the Committee requested information about the status of the Covenant within the State's domestic legal system. In almost all the lists, examples of cases in which domestic courts had considered or applied the Covenant were requested. In a little over half of the lists, States parties were asked about legislative measures taken to implement one or more of the rights.

54. The reports by States were consistent with the finding of widespread domestic recognition of economic and social rights. In 13 State party reports addressing the issue of the domestic law status of the Covenant, a range of statuses were reported: in some States, the Covenant applied directly, in others, it prevailed in cases of inconsistency, benefited from a "presumption of compatibility" or could be invoked as a persuasive authority. Half of the States indicated that the economic and social rights recognized in legislation or constitutional provisions were justiciable and one third of the States provided some examples of cases.

55. Despite these impressive reporting figures, in half of the concluding observations the Committee recommended that measures be taken to ensure the "direct applicability" of the Covenant in the domestic legal order. In slightly less than half of the concluding observations, the Committee also recommended that the State concerned seek to raise awareness of the justiciability of the rights. And in almost every concluding observation

[32] See Center for Economic and Social Rights, "The universal periodic review: a skewed agenda?" (2016).

(27), the Committee recommended that legislation be enacted or amended in order to implement Covenant obligations.

C. Non-governmental organizations

56. One of the most encouraging developments in recent years in relation to economic and social rights has been the growth of specialist NGOs at the international, national and, especially, local levels working to promote either economic and social rights in general or specific rights such as those relating to health, housing, education, water, gender equality, disability and ageing.

57. Nevertheless, some of the major international NGOs continue to approach economic and social rights in ways that do very little to change the marginality of those rights within the field. This is especially problematic because these organizations still disproportionately influence the overall shape of the non-governmental agenda, especially at the international level. Good faith efforts in recent years to develop a more positive and proactive approach to economic and social rights have succeeded in moving the field forward in relation to several issues that are important, even though they represent a rather narrow slice of the overall economic and social rights pie. Reporting on issues such as forced evictions, maternal mortality, discrimination in access to schooling, access to palliative care and to HIV/AIDS drugs, and sexual and reproductive health, has contributed significantly in these areas, but the approaches adopted have too often relied almost entirely on using a discrimination lens and avoided reliance on the economic and social rights framework. When combined with policies that eschew issues that involve redistributing resources or require significant budgetary allocations, the approach can amount to a self-denying ordinance that effectively maintains the status quo and ensures that the core economic and social rights issues will not be adequately addressed.

58. When constitutions are being rewritten, the major NGOs are vocal in calling for the inclusion of civil and political rights, but rarely mention economic and social rights. When transitional justice mechanisms are being shaped, their concerns focus overwhelmingly on civil and political rights, even though many such violations go hand in hand with economic and social rights violations, and the measures required to bring reconciliation and justice would need to incorporate economic and social rights dimensions if they are to be comprehensive as well as designed to avoid non-repetition. Instead, those issues are most likely to be characterized as development concerns.

59. One of the biggest economic and social rights challenges confronted by civil society organizations has been to identify a methodology for monitoring these rights. This has gone hand in hand with questions about who bears responsibility for economic and social rights violations, to whom demands for action should be addressed, how judgments can be made as to the acceptability of trade-offs between one social right and another and what remedies are appropriate. These dilemmas are especially problematic in the absence of the RIA framework at the national level, but many of the NGOs have either consciously or otherwise not directed their attention to these dimensions. Others have dismissed them as issues in relation to which international NGOs are poorly placed to advocate.[33]

[33] "International human rights organizations might press governments to adopt the legislation — the statutory rights — needed to make litigation a meaningful tool to enforce ESC rights. That is inevitably useful, but it is a procedural device that still falls significantly short of actual implementation." See Kenneth Roth, "Defending economic, social and cultural rights: practical issues faced by an international human rights organization", *Human Rights Quarterly*, vol. 26, No. 1 (February 2004), p. 63.

60. If the recognition, institutionalization and accountability building blocks were solidly in place in many countries, it would follow that the main focus of advocacy efforts to promote a higher level of real-life enjoyment of economic and social rights should be elsewhere. It may be that this assumption explains why so many of those working to promote economic and social rights, whether through the United Nations or regional organizations or at the national level, have now turned their attention to matters such as developing new methodologies for measuring compliance with the Covenant, exploring new and much more detailed indicators, working out how such indicators can be disaggregated to take account of a wide range of specific factors — such as gender, age, ethnicity and social origin —, identifying means by which to ensure that decision-making processes are transparent and participatory, and developing more detailed normative guidelines, recommendations, principles and other such instruments that elaborate upon or seek to operationalize governmental obligations in relation to economic and social rights.

61. The problem is that, unless the basic building blocks of recognition, institutionalization and accountability are in place, it is highly unlikely that other more sophisticated techniques are going to be effective. It is difficult to imagine less fertile ground for many such initiatives than contexts in which economic and social rights remain unrecognized as rights, where the relevant institutions are not working effectively to promote economic and social rights as rights and where there is little or no concept of economic and social rights accountability in place. It is hoped, of course, that these new techniques, developed and promoted externally, can compensate for, or even overcome, the inhospitable domestic environment within which they will eventually have to be implemented. But again, there would seem to be a strong element of wishful thinking in the expectation that States that have not been able or willing to put the foundations of economic and social rights in place, will be likely to implement even more demanding and sophisticated techniques for monitoring and promoting economic and social rights.

62. None of this is to suggest that these other endeavours are not of major importance, but the argument is that they will have far less impact where the RIA framework is not in place.

VI. Conclusions

63. A conception of human rights that implicitly accepts a radical hierarchical distinction between the two sets of rights — civil and political rights, and economic, social and cultural rights — is one that is fundamentally incompatible with international human rights law. Just as importantly, it offers no solution to the increasingly urgent challenges posed by radical and growing inequality and widespread material deprivation in a world of plenty. The economic and social rights agenda is thus too important, and its neglect has too many powerfully negative implications for the overall human rights enterprise, for it to be marginalized by mainstream actors and left to a handful of specialist groups to struggle to give it the place that law and justice demand.

64. It is essential for the proponents of economic and social rights to acknowledge the deeply rooted nature of the continuing strong resistance to the very concept of economic and social rights as human rights. The adoption of more resolutions and the holding of more meetings should not be permitted to conceal this fact. The reality is that governments have not accidentally overlooked the significance of the recognition, institutionalization and accountability (RIA) framework. On the contrary, the widespread failure to ensure that these three building blocks are in place in relation to economic and social rights is the principal symptom of the resistance. Proponents of economic and social rights need to acknowledge and tackle this deeper political reality rather than sailing merrily along as though there is widespread and basic agreement on economic and social rights.

65. Despite the rhetoric of indivisibility, both national and international endeavours to promote and protect economic and social rights are overshadowed by the assumption that while economic and social rights are desirable long-term social goals, they should not be treated as full-fledged human rights. The present report is not the place to review in detail the familiar arguments that have been invoked in support of this approach, which include claims that economic and social rights are too expensive, too vague, too empowering of the State, are potentially limitless, reward and encourage laziness, penalize wealth creation, undermine economic growth and are inimical to international competitiveness. These arguments, traditionally associated with those who might describe themselves as libertarians, neo-conservatives, free-marketeers or small government advocates, have triumphed in many countries in the twenty-first century and have been actively promoted by the most influential international organizations in the fields of development, finance and trade. While compelling counter-arguments have been put forward in response to each of the critiques, the biggest challenge by far is essentially ideological. The economic and political power of entrenched elites is best protected by policies that marginalize economic and social rights.

66. Many human rights proponents seem to prefer not to engage in these debates for fear that doing so would be a lost cause and that economic and social rights would be discredited or disowned rather than just marginalized or neglected. But that strategy leads to the same result in practical terms, except that the illusion is maintained that economic and social rights are an integral, even indivisible, part of the overall human rights framework.

67. The framework of legal recognition that underpins the approach adopted in the present report by no means exhausts the range of approaches that are and should be used in the promotion of economic and social rights. Campaigns to educate both rights holders and professionals, empower community groups, facilitate local-level activism or enable monitoring are all part of the expansive toolbox for economic and social rights activism.[34] As has been cautioned:

> Unless all participants in [economic and social rights] litigation are conscious of the institutional limitations of the courts and consider the possibility that the particular claim may be more effectively addressed through another forum such as advocacy or community mobilisation, there will be the ever-present danger of untimely or inappropriate resort to litigation, and judgments that impede rather than facilitate transformation.[35]

68. The legal framework will influence all of these other dimensions and avenues and it is one of the dimensions that can most meaningfully be promoted and monitored through United Nations and related mechanisms. Put succinctly:

> Contemporary movements for social change cannot avoid working in the legal medium. There are no "law-free" zones in modern societies to which activists can repair so as to avoid entanglement with law and system. ... Legal entitlements (including those formulated as "rights") strongly influence the distribution of wealth and power and partially construct identities. Social change movements cannot avoid engagement on this terrain, and it is difficult

[34] Peter Houtzager and Lucie E. White, "The long arc of pragmatic economic and social rights advocacy", in *Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty*, Lucie E. White and Jeremy Perelman, eds. (Stanford, California, Stanford University Press, 2011), p. 172.

[35] See Sandra Liebenberg, *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Claremont, Juta, 2010), pp. 77-78.

to see how they can do this effectively without some type of "higher law" discourse of the kind captured in the idiom of fundamental rights.[36]

69. In other words, even when it appears to be marginal and best ignored, the legal framework of recognition or non-recognition will, in practice, wield significant influence in terms of how economic and social rights are perceived and what advocacy opportunities are closed down or opened up. The legal framework can, at least partially, empower or disempower and legitimize or delegitimize those who advocate respect for economic and social rights. Thus, even those who argue that the battle over economic and social rights will inevitably be won or lost in the political arena would be well advised not to neglect the recognition, institutionalization and accountability dimensions. This is not for a moment to suggest that the many other dimensions of economic and social rights-related advocacy are unimportant. The argument is that most, if not all, of them will be less effective if the RIA framework is not in place as a matter of State policy.

70. The RIA framework is no magic bullet. There are all too many examples of situations in which clearly recognized economic and social rights, to which meaningful accountability mechanisms attach in principle, have done little or nothing to improve the situation. But this generally reflects a failure of will, competence or capacity, rather than a flawed framework. Nor is the report arguing that these three steps are all that is required or that the many other approaches that are currently being pursued are not potentially very important.

71. It is important to recognize that the promotion of economic and social rights as human rights, including a particular emphasis on the elements of the RIA framework, does not imply that there is a universal one-size-fits-all approach that will secure the realization of economic and social rights in countries with very different histories, legal systems, traditions and cultures. Nor does it assume that everything needs to be done at once, or that a maximalist approach is indispensable. Strong arguments in favour of an incremental approach to economic and social rights adjudication in contexts in which the notion is relatively novel holds lessons for moving progressively, and with all appropriate speed, in relation to other elements of the overall package.[37] There is immense space for the processes of "vernacularization", or translation into languages and forms, that are meaningful at the local level and about which various authors have written with great insight.[38]

72. One of the challenges that emerges most clearly from this analysis is that more research is needed in order to generate a better understanding of what works and what does not, in terms of the overall agenda for the promotion of economic and social rights. The focus needs to be less on what governments, civil society groups and scholars think they are best placed to do and more on what objectively needs to be done to ensure the progressive recognition and realization of economic and social rights.

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[36] See Karl Klare, "Critical perspectives on social and economic rights, democracy and separation of powers," in *Social and Economic Rights in Theory and Practice: Critical Inquiries*, Helena Alviar García, Karl Klare and Lucy A. Williams, eds. (London, Routledge, 2015), p. 3.

[37] See Jeff King, *Judging Social Rights* (Cambridge, United Kingdom, Cambridge University Press, 2016).

[38] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, University of Chicago Press, 2006).

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Special Rapporteur on extreme poverty and human rights on his mission to Chile

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extreme poverty and human rights on his visit to Chile from 16 to 24 March 2015. The Special Rapporteur found that, while Chile has taken giant steps forward in social and economic development, it remains a highly segregated and unequal society with unacceptable rates of poverty and extreme poverty. The Special Rapporteur identifies the main factors hindering the effectiveness of the efforts of Chile in tackling poverty and inequalities, including the fragmentation of anti-poverty programmes, the lack of sufficient "institutionality" to implement human rights, the attenuated role of labour market institutions to protect labour rights, persistent discrimination against and the absence of constitutional, legal and institutional protection of marginalized groups, such as indigenous peoples, children, lesbian, gay, bisexual, transgender and intersex persons and migrants. The Special Rapporteur's recommendations include the adoption of a comprehensive anti-poverty programme that is well-coordinated among the various ministries and the establishment of a well-funded and well-staffed Office of the Under-Secretary for Human Rights integrating economic, social and cultural rights as a key part of its mandate.

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Report of the Special Rapporteur on extreme poverty and human rights on his mission to Chile*

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* Circulated in the language of submission and in Spanish only.

I. Introduction

1. Pursuant to Human Rights Council resolutions 8/11 and 26/3, the Special Rapporteur on extreme poverty and human rights conducted an official visit to Chile from 16 to 24 March 2015. The purpose of the visit was to gather information and engage in a dialogue on the situation of poverty and inequality in Chile and the relationship of these issues to human rights, with a view to offering constructive recommendations to the Government and other stakeholders.

2. During the course of his visit, the Special Rapporteur met with the President, Michelle Bachelet, the President of the Senate, members of Congress, the Minister for Social Development, the Vice-Minister of Finance, the Vice-Minister of Justice, the Vice-Minister for Health, the Minister Director of the National Service for Women, the National Director of the National Indigenous Development Corporation and many other officials. The Special Rapporteur visited Santiago and its outskirts, including Campamento San Francisco and Bajos de Mena and Temuco and Boyeco in the Araucanía region.

3. The Special Rapporteur is grateful to the National Human Rights Institute and the various non-governmental organizations whose representatives briefed him on the issues and arranged invaluable opportunities to speak with persons living in poverty. In addition, various experts from the Economic Commission for Latin America and the Caribbean (ECLAC) were extremely helpful. The Resident Coordinator and his team, as well as officials of the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Population Fund, the United Nations Children's Fund (UNICEF), the International Labour Organization (ILO), the Food and Agriculture Organization of the United Nations, the World Bank and the World Health Organization, also provided advice and information.

4. The Special Rapporteur is grateful to the Government of Chile for having invited him. He benefited from excellent cooperation from the Government, as well as from civil society, scholars and persons living in poverty. The OHCHR Regional Office for South America, in Santiago, also provided valuable support throughout the visit.

5. In section II, the Special Rapporteur provides an overview of the situation of poverty and inequality in Chile, finding that the persistently high levels of inequality are incompatible with full respect for human rights. In section III, he sets out the main factors hindering the effectiveness of the efforts of Chile to tackle poverty and inequalities, including the fragmentation of anti-poverty programmes, the lack of sufficient "institutionality" to implement human rights, the attenuated role of labour market institutions to protect labour rights, persistent discrimination against and the absence of constitutional, legal and institutional protection of marginalized groups such as indigenous peoples, children, lesbian, gay, bisexual, transgender and intersex persons and migrants. In section IV, the Special Rapporteur offers recommendations to the Government of Chile.

II. Poverty, extreme poverty and inequality in Chile

6. The situation of poverty and inequality in Chile reflects a paradox. Since the end of the Pinochet era, the country has made extraordinary progress in terms of economic growth, overall development and poverty reduction, but at the same time troubling rates of poverty and extreme poverty persist among some population groups and inequality levels are extremely high. Those rates are neither sustainable nor acceptable in a society that prides itself upon a strong and deep commitment to respecting human rights for all of its peoples.

7. But the "bad" news must not be permitted to overshadow the good news. Since the end of the dictatorship, and especially under the three most recent administrations, Chile has taken giant steps forward in relation to social as well as economic development. It has turned itself from a widely condemned authoritarian State during most of the 1970s and all of the 1980s into a much-admired model for other States in terms of its economic growth, the rejuvenation and consolidation of its democracy and the concerted efforts it has made in relation to human rights. And the breadth and depth of the agenda of the Government of President Bachelet for enhancing respect for human rights across the whole society is as impressive as it is daunting.

8. The starting point for efforts to eliminate poverty is to acknowledge the extent of the challenge. Accurate, disaggregated measures of the key components are essential, as is the adoption of a methodology that is scientifically sound, independently applied and based on full consultation. While the most recent census was problematic and has been generally discounted as a result, Chile has developed an impressive and innovative national household survey, the National Social and Economic Survey (CASEN). The 2013 survey generated a report on modern and transparent measurement of poverty for Chile, published in January 2015.[1] In addition to the traditional focus on income poverty, the survey tracks multidimensional poverty, which is measured by giving equal weight to indicators relating to education, health, work and social security, and housing. This approach represents an important and commendable step towards measuring poverty as a multidimensional phenomenon.

9. According to the latest CASEN survey, income-based poverty levels dropped from 38.6 per cent of the population in 1990 to 7.8 per cent in 2013, with extreme poverty at 2.5 per cent. But, by using an adjusted poverty line, which takes into account changes in the consumption patterns of an average Chilean household today,[2] the poverty rate in 2013 was calculated at 14.4 per cent, with 4.5 per cent living in extreme poverty. These figures were down from 29.1 per cent and 12.6 per cent, respectively, in 2006. The survey also estimated a multidimensional poverty rate of 20.4 per cent.

10. These figures show both considerable progress but also significant continuing rates of poverty and extreme poverty, with almost 1 in 20 Chileans still living in a situation of extreme deprivation, and 1 in every 5 Chileans live in a situation of multidimensional poverty. But even these statistics do not capture the full extent of the challenges. Many of those not classified as living in poverty survive on very low incomes and live in precarious situations that make them very vulnerable to falling into poverty. According to the CASEN survey in 1996, 2001 and 2006, around 1 in 3 Chileans had fallen into a situation of poverty at least once in those years.[3] For a country that prides itself on being a model for Latin America and a member of the Organization for Economic Cooperation and Development (OECD), poverty levels in Chile remain unacceptably high, despite progress in recent decades.

11. The Special Rapporteur visited areas with high levels of poverty to speak with residents and learn first-hand about their situation. In Bajos de Mena, a social housing

[1] See http://observatorio.ministeriodesarrollosocial.gob.cl/documentos/Presentacion_Resultados_Encuesta_Casen_2013.pdf.

[2] Chile, Ministry of Social Development, *Nueva Metodología de Medición de la Pobreza por Ingresos y Multidimensional*. Available from http://observatorio.ministeriodesarrollosocial.gob.cl/documentos/Nueva_Metodologia_de_Medicion_de_Pobreza.pdf.

[3] See also La Fundación para la Superación de la Pobreza, *Umbrales Sociales Para Chile* (2009). Available from www.superacionpobreza.cl/wp-content/uploads/2014/02/UMBRALES_SOCIALES.pdf.

project in Santiago that is often described as a ghetto, the Special Rapporteur met people who were clearly living in substandard conditions. This neighbourhood is home to around 120,000 people but lacks the most basic government services, such as a hospital, a fire station, a police station and schools. Part of Bajos de Mena, Villa San Guillermo, is built on top of a former landfill and various families complained of explosions caused by the underground build-up of methane gas and a high rate of illness among residents.

12. The Special Rapporteur also visited Campamento San Francisco, the largest settlement of its kind in the Metropolitan region. According to Un Techo Para Chile, a leading non-governmental organization working on housing issues, there were a total of 676 settlements in Chile in 2014, housing 32,533 families or well over 100,000 people.[4] Those living in Campamento San Francisco have no running water for cooking or sanitation purposes and many use wood for heating and cooking, thus creating a high risk of fire. The residents complained of the poor care they receive when they go to health centres, long waiting times and a failure to take many of their problems seriously. Parents expressed concern about the poor quality of the education their children receive, as reflected in low test scores. The residents felt strongly that they were being denied access to the basic government services and assistance provided to better-off groups and that this denial undermined their opportunities and those of their children to be able to escape from living in poverty through their own efforts and merit. It is difficult to accept that, in a society as well off as Chile, such slum areas cannot be eliminated through concerted measures to respond to the needs and rights of the affected individuals.

13. In addition to significant poverty levels, Chile continues to experience extreme economic and social inequality. Its level of income inequality, after government taxes and transfers, is the highest among OECD countries. According to the latest CASEN survey, income inequality indicators have not improved significantly over the past decade. The Gini coefficient has remained around 0.5 and indicators measuring the amount of income earned by the top and the bottom income deciles show very little improvement. In 2014, OECD estimated the average income of the richest 10 per cent of the population in its member countries at about 9.5 times that of the poorest 10 per cent.[5] In Chile, the disparity is 27 to 30 times greater. Even by Latin American standards, a region with very high income inequality, Chile scores badly.[6] It is estimated that only 17 countries in the world have a worse Gini coefficient than Chile.[7]

14. But even apart from income inequality levels, Chile remains a highly segregated society in many respects. First, there are large geographical inequalities between regions and within cities. The CASEN data for 2013, which estimated 4.5 per cent of the national population to be living in income-based extreme poverty, masks wide variations across regions. In Araucanía, a region with a large Mapuche population, the extreme poverty rate in 2013 was 10.6 per cent, while it was only 2.6 per cent in the Metropolitan region, which includes Santiago. But even within Santiago, the differences are enormous. A 2013 study compared income levels near the city's subway stations and found that if you travelled by subway for only 20 minutes from the north-west (Lo Prado station) to the north-east (Pedro de Valdivia station), income per capita changed from a level comparable to Belize to one

[4] Figures available from www.techo.org/paises/chile/?s=32.533.

[5] See F. Cingano, "Trends in Income Inequality and its Impact on Economic Growth", OECD Social, Employment and Migration Working Papers, No. 163 (2014), p. 9.

[6] See Economic Commission for Latin America and the Caribbean (ECLAC), *Compacts for Equality: Towards a Sustainable Future* (2014), p. 119.

[7] Data available from http://hdr.undp.org/en/content/table-3-inequality-adjusted-human-development-index.

comparable to that of Portugal.[8] The same study shows a high correlation between income levels and children's mathematics scores: the lower the income level, the lower the scores. Poverty and inequality are thus transmitted from one generation to the next.

15. Second, there are large differences in access to, and the quality of, essential services among different groups in Chile. Given its impact on intergenerational mobility, education is especially important. While inequality in the number of years of education enjoyed has been reduced, the education system is still highly segregated. The poorest children receive the poorest-quality education and children from poor, middle-income and high-income backgrounds rarely attend the same schools. In 2012, only 68 per cent of students from the poorest families met the basic proficiency mark in mathematics in the Programme for International Student Assessment exam, compared to 97 per cent of students from the richest families.[9] While tertiary education enrolment rates have increased since the early 1990s, in 2009, the number of students from the highest income quintile who completed tertiary education was 31 per cent higher than that of students from the lowest income quintile.

16. The challenge of reducing inequality in the education sector remains a pressing one and should be a central concern in the framing of the complex and ambitious agenda that the Government has set itself in this area. Because the proposed reforms continue to be the subject of discussion of lively and broad-based debate within the whole society, it is sufficient for the Special Rapporteur to stress that particular attention needs to be given to ensuring that those living in poverty help to shape the reforms and are able to benefit fully from them. Moreover, it is important to acknowledge that educational desegregation will not happen in the absence of broader societal desegregation achieved through equally targeted measures in other sectors.

17. Extreme inequalities are major obstacles to efforts to eliminate poverty. It has been shown that economic growth in countries with higher income inequality has less impact on poverty reduction than in countries with less income inequality.[10] As the World Bank has noted: "On average, for countries with low levels of income inequality, a 1 percentage point growth in mean incomes leads to about a 4 percentage-point reduction in the incidence of $1 per day poverty. That power falls to close to zero in countries with high income inequality."[11] And not only do higher economic inequalities reduce the effect of economic growth on poverty reduction, economic inequalities actually hurt economic growth.[12]

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[8] See Juan A. Echenique and Sergio S. Urzúa, "Desigualdad, Segregación y Resultados Educacionales Evidencia desde el Metro de Santiago", *Puntos de Referencia*, No. 359 (May 2013).

[9] Tamar Manuelyan Atinc and Carol Graham, "Can education reform address inequality and middle class frustration? An experiment in Chile", 9 May 2014. Available from www.brookings.edu/blogs/education-plus-development/posts/2014/05/09-education-reform-inequality-middle-class-frustration-chile-atinc-graham.

[10] Report of the Secretary-General on the role of the United Nations in promoting a new global human order and an assessment of the implications of inequality for development (see A/67/394, para. 17); and United Nations Research Institute for Social Development, *Combating Poverty and Inequality: Structural Change, Social Poli[illegible] and Politics* (United Nations publication, Sales No. E.10.III.Y.1), p. 5. The Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities noted that income distribution in a society is directly related to existing levels of poverty. (see E/CN.4/Sub.2/1997/9, para. 22).

[11] World Bank, *World Development Report 2006: Equity and Development* (World Bank and Oxford University Press, 2005), p. 9.

[12] "Drawing on harmonised data covering the OECD countries over the past 30 years, the econometric analysis suggests that income inequality has a negative and statistically significant impact on subsequent growth": Cingano, "Trends in Income Inequality and its Impact on Economic Growth", p.

18. In another study, the World Bank concluded that "no country has successfully developed beyond middle-income status while retaining a very high level of inequality in income or consumption".[13] The implications for the fight against poverty in Chile are evident: reducing economic inequalities is crucial to reducing poverty.

19. The inequalities described in the present report are deeply problematic and result in a highly segregated society in which the existence of unconnected residential areas and schools operates to entrench privilege and stifle mobility. Such high levels of inequality are incompatible with full respect for human rights. There is, however, an encouraging consensus within Chilean society on the need to take specific measures to tackle this issue. The Government's agendas in the fiscal, educational and electoral arenas are all intended in part to address the problem of inequality. But it is widely acknowledged that fiscal reforms alone cannot suffice to reduce extreme inequality and it will be some years before any inequality-reducing benefits of educational reforms are apparent. Thus, significant reforms will continue to be needed in many of these areas to ensure that the effect on inequalities is not merely cosmetic.

III. Main findings

A. Fragmentation of anti-poverty programmes

20. Chile has a wide and impressive array of programmes aimed at tackling poverty, including the Chile Solidario Programme, the Ethical Income Programme and Chile Crece Contigo ("Chile grows with you"). Despite these programmes, poverty and extreme poverty persist. It is thus necessary to go beyond these separate programmes and to develop a coherent and integrated poverty eradication programme. While steps have been taken to improve programme coordination, including through the creation of the Office of the Executive Secretary for Social Protection and a council of ministers working in the area of social protection, the work of the Government to tackle poverty seems to be unduly fragmented among key ministries. Many people to whom the Special Rapporteur spoke, both in the Government and civil society, confirmed the existence of significant coordination problems and the absence of a truly intersectoral approach to poverty eradication that transcends individual ministries.

21. The Ethical Income Programme, for instance, consists of multiple components, including unconditional or conditional cash transfers and psychosocial and employment support. It appears, however, that a lack of interministerial coordination, particularly between the Ministry of Social Development and the Ministry of Labour and Social Security, results in the fragmented implementation of what could potentially be a truly innovative and effective programme.

22. In addition, many of the reforms of the current Government seem to be predominantly driven by the interests of the middle classes and there is a major risk that the interests of those living in poverty will be overlooked. At present, poverty remains below the radar for most policymakers. Most anti-poverty programmes target the extreme poor

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6. "Second, lower net inequality is robustly correlated with faster and more durable growth, for a given level of redistribution. These results are highly supportive of our earlier work": Jonathan D. Ostry, Andrew Berg and Charalambos G. Tsangarides, "Redistribution, inequality, and growth", IMF Staff Discussion Note, February 2014, p. 4.

[13] See Francisco H.G. Ferreira and Martin Ravallion, "Global poverty and inequality: a review of the evidence", World Bank Policy Research Working Paper, May 2008, p. 8.

and cash transfer levels are low. In 2012, the average unconditional monthly cash transfer was US$ 27 per household, and US$ 13 per person. This programme is not ambitious enough for a middle-income country such as Chile.

23. Given the strongly sectoral nature of reform discussions, there is also a real risk that issues such as pensions, health care or education will be treated in isolation rather than as part of an integrated set of solutions. The fragmentation of programmes among key ministries is, of course, not unique to Chile, but it needs to be addressed.

B. Constitutional, institutional and democratic human rights reform

24. Post-dictatorship Chile has warmly embraced the language of human rights. There is, however, much to be done before it can be said that human rights provide the foundations upon which social and economic policy rest. Too many Chileans still seem to equate human rights with the crimes of the dictatorship. In fact, the international obligations accepted by Chile extend far beyond issues such as disappearances, torture, killings and arbitrary arrests and apply as much to the present as they do to the past. A thriving democracy needs to pay attention to the quality of political participation and the ability of people to influence the shape of the society in which they live. And economic, social and cultural rights must be acknowledged as fully fledged human rights, not just as matters of social policy.

25. The existing Chilean Constitution has some economic, social and cultural rights provisions concerning health, education and social security. However, the formulations used do not generally conform to international standards and are not firmly anchored in the language of rights and obligations. The methods of implementation envisaged are relatively open-ended and non-empowering and do not explicitly include judicial action. The Committee on Economic, Social and Cultural Rights expressed concern in 2004 that some economic, social and cultural rights, including the right to housing, are not considered justiciable in the State party (see E/C.12/1/Add.105, para. 12). A 2015 report by the Chilean Supreme Court indicates that progress has been made with regard to the justiciability of economic, social and cultural rights in the past decade.[14] However, various experts with whom the Special Rapporteur met in Chile called for stronger legal protection of these rights. In June 2015, the Committee on Economic, Social and Cultural Rights reiterated its concerns both about the inadequacy of existing constitutional recognition and of available remedies (see E/C.12/CHL/CO/4, para. 7).

26. While expanded constitutional recognition and greater judicial engagement are important, more needs to be done in terms of *institucionalidad*. This is a Spanish term whose English translation — institutionality — is used only rarely and even then without particular significance. It refers to the institutional arrangements that are needed to underpin the rule of law and human rights. Despite a strong and now long-standing commitment to human rights, there has never been a comprehensive institutional structure to promote the policies necessary to their implementation.

27. An important initiative on institutional structure is the proposal to create a new Office of the Under-Secretary for Human Rights within the revamped Ministry of Justice and Human Rights.

[14] See Chile, Supreme Court, Study, Analysis and Evaluation Directorate, "Reporte preparatorio para el 4° Informe Periódico de Chile sobre el cumplimiento del Pacto Internacional de Derechos Económicos, Sociales y Culturales de las Naciones Unidas", March 2015.

28. There is a significant need for an entity with the responsibility, authority, funds and resources to coordinate government-wide human rights policies. The process of setting up the Office seems, however, to have stalled and it is desirable that a message be sent from the highest level of Government that its establishment is a priority. Once created, owing to the new ministerial structure, it should be ensured that economic, social and cultural rights are an integral part of the Office's mandate and that those rights receive attention equal to that given to civil and political rights.

29. Chile has been a highly responsible international citizen in terms of its consistent high-quality engagement with human rights monitoring bodies, but the one area in need of significant reform concerns the way in which international recommendations are dealt with at the national level. The new Office of the Under-Secretary for Human Rights could take the lead in ensuring systematic and coordinated follow-up to such recommendations.

30. The Special Rapporteur notes that the proposed permanent commission on the crimes of the Pinochet dictatorship is expected to have significantly more staff and a higher budget than the proposed Office of the Under-Secretary for Human Rights. This distribution of funds risks being seen as giving greater importance to addressing the violations of the past than to developing appropriate policies and institutions to ensure respect for human rights today. Adequate budgeting and staffing for the new Office of the Under-Secretary for Human Rights is thus crucial.

31. Another area of necessary institutional reform is the democratic system of Chile. Although very impressive progress has been made since 1990, there is ample evidence that the full realization of democratic rights is closely linked to the reduction in inequalities. During the years of the Pinochet dictatorship, income distribution in Chile worsened steadily.[15] After the return to democracy, the period 1990-2009 saw a rapid decline in poverty, as well as a more moderate decline in income inequality. The reintroduction of democracy in 1990 seems to have had a positive impact on the reduction of poverty and inequality, a process described by ECLAC in the following terms:

> The political dynamic behind the recent decline in inequality has also been important. Democratic life has given rise to new electoral preferences and brought social demands to greater prominence. This means that, in a positive cycle of economic stability, governments respond to these demands for social inclusion with new, more redistributive policies.[16]

32. It is widely accepted that a more inclusive democracy, with high levels of participation and effective representation of the different groups in society, will lead to more equality. It is thus the quality of the democracy, rather than just democracy itself, that will affect inequality.[17] An acknowledged structural flaw in the Chilean democratic system has been the "binomial" electoral system, said to have been designed by the dictatorship to prevent democratic parties from achieving congressional majorities. According to one source, this functioned as "the linchpin of the authoritarian institutional framework holding the various authoritarian enclaves together and preventing reforms to the 1980 Constitution

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[15] Dante Contreras and Ricardo Ffrench-Davis, "Policy regimes, inequality, poverty, and growth: the Chilean experience, 1973-2010", in *Falling Inequality in Latin America: Policy Changes and Lessons*, Giovanni Andrea Cornia, ed. (Oxford, 2014), p. 95.

[16] See ECLAC, "Compacts for Equality", p. 71.

[17] "The quality of democracy is influenced also by its consolidation (the uninterrupted number of years during which democratic rule has existed in a country) and by the extent of popular participation to free elections": Giovanni Andrea Cornia, "Inequality trends and their determinants: Latin America over the period 1990-2010", in *Falling Inequality in Latin America*, p. 39.

without the agreement of the Right".[18] Others have written that the "heavily biased" binomial electoral system that "favors the wealthy" was "one of the most consequential legacies of former dictator Augusto Pinochet's 1980 constitution".[19] The legislature's decision to end the binomial system is therefore welcome.

33. In addition to the obvious impact of significant economic and social inequalities on the functioning of a democracy, high inequality also greatly distorts political participation, thereby affecting the quality of democracy. One Chilean study found that the higher the socioeconomic status of students, the higher their expected electoral participation.[20] Another study by the same authors concluded that a school's socioeconomic composition also influenced the expected future political participation of its students:

> Belonging to a public school in both years implied lower expectations of formal involvement in the political system ... In other words, rather than administrative dependency itself, it is the socioeconomic composition of schools that matters most in predicting future political participation ... This effect seems relevant for the Chilean case, since the high socioeconomic segregation of the educational system implies that the students from the few schools with high socioeconomic status will be eventually overrepresented in terms of political voice in the future, thereby economic inequality breeds political inequality.[21]

34. Thus, the elimination of the binomial system, while an important reform, will need to be accompanied by sustained measures to enhance broad-based participation in the political system through eliminating the obstacles generated by extreme inequality.

C. Discrimination, poverty and inequality

35. In 2012, Chile adopted the new Anti-Discrimination Act (Act No. 20,609). That law had been proposed in Congress years earlier, but was effectively stalled until a 24-year-old gay man Daniel Zamudio was beaten to death in Santiago. Public outcry and international criticism after the killing of Mr. Zamudio finally led to the adoption of the Anti-Discrimination Act in 2012. Because of the link between the brutal killing of Mr. Zamudio and the adoption of the law, the latter is almost synonymous in the public mind with the prohibition of discrimination against lesbian, gay, bisexual, transgender and intersex persons.

36. The new law was a major step forward in tackling discrimination, but there is still much to be done to bring Chile into line with its international obligations. A major criticism of the 2012 Anti-Discrimination Act is that it lacks a proper enforcement mechanism. At present, there is no separate agency or government entity that is responsible for enforcing the law. Under article 3 of the Act, those who are directly affected by an act of "arbitrary discrimination" are entitled to bring an action before a judge. This leaves it up to those individuals who are often the most vulnerable members of society to seek enforcement of the law. It is clear that leaving enforcement up to the courts, rather than establishing a separate agency or government entity, was a political compromise to reassure those who

[18] Daniel Pastor, "Origins of the Chilean Binominal Election System", *Revista de Ciencia Politica*, vol. XXIV, No. 1 (2004).

[19] Mike Albertus and Victor Menaldo, "South Africa, unequal by design", *Foreign Policy*, 3 January 2014.

[20] See Juan Carlos Castillo and others, "Mitigating the political participation gap from the school: the roles of civic knowledge and classroom climate", *Journal of Youth Studies*, vol. 18, No. 1 (2015).

[21] See Juan Carlos Castillo and others, "Social inequality and changes in students' expected political participation in Chile", *Education, Citizenship and Social Justice*, vol. 9, No. 2 (2014), p. 153.

opposed the law. The jurisprudence to date seems to confirm, however, that courts in Chile are not particularly well-disposed towards enforcing the Anti-Discrimination Act.[22]

37. The law has a number of weaknesses, in addition to the problem described above: (a) the definition of discrimination is very narrowly drawn; (b) the principle of equality between men and women is absent; (c) the emphasis is upon achieving "equity", but this is very different from the goal of substantive equality; and (d) there are no provisions relating to affirmative action or temporary measures, which thus deprives the law of much of its potential impact.

38. If anti-discrimination laws are to be effective in tackling forms of discrimination that directly or indirectly cause poverty and inequality, they will need to be significantly strengthened. This includes provisions relating to discrimination against women, persons with disabilities, indigenous peoples, non-citizens and others.

39. There is a particular need to strengthen measures to combat gender discrimination and gender inequality. The 2013 CASEN survey indicates that 11.2 per cent of male-headed households were living in poverty, compared to 15.4 per cent of female-headed households. For households living in extreme poverty, the figures are 3.1 per cent and 5.3 per cent, respectively. Gender discrimination remains a major problem in the labour market and the origin of many gender inequalities. Based on its mission in 2014, the Working Group on the issue of discrimination against women in law and in practice concluded that there does not appear to be any specific and systematic enforcement of equal employment opportunity, as shown by a wage gap between men and women of 30 per cent.[23] The gap is larger between men and women with 13 or more years of schooling than between men and women with less schooling. This is problematic because it suggests that women cannot escape their relative disadvantage through education.[24] Female participation in the labour market remains low, especially in relation to the lower income deciles, where many women work in the informal sector or perform unpaid care work.

40. Women in Chile face discrimination at all ages. The 2008 pension reform had a positive impact on the position of women, especially through the establishment of a new "solidarity pillar" and a motherhood allowance. But discriminatory aspects remain. On average, women earn lower salaries than men and are overrepresented in informal jobs that do not lead to pension contributions. As a result, their pensions are considerably lower than men's.[25] Because women retire with lower pensions but live longer than men, they are at greater risk of spending old age in poverty. In addition, because gender-specific mortality tables are used to calculate pensions, women receive smaller monthly pensions than men because they live longer, even when they have the same amount of pension savings as men.[26]

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[22] See Lidia Casas Becerra, "Análisis crítico de la acción de no discriminación arbitraria a la luz de los primeros casos", *Annuario de Derechos Humanos* (2014), pp. 127-137.

[23] Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15005&LangID=E.

[24] Alicia Puyana, "Economic growth, employment and poverty reduction: a comparative analysis of Chile and Mexico", Employment Working Paper, No. 78 (ILO, 2011), p. 41.

[25] Aida Caldera Sánchez, "Policies for Making the Chilean Labour Market More Inclusive", OECD Economics Department Working Papers, No. 1117 (2014), p. 9.

[26] Comments and contributions of civil society for the list of issues and questions related to the consideration of the fourth periodic report of Chile by the Committee on Economic, Social and Cultural Rights, 1 October 2014. Available from http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CHL/INT_CESCR_ICO_CHL_18430_E.pdf.

41. Teenage girls, especially from poorer backgrounds, face both health-care and education-related discrimination when they become pregnant. This is even more problematic given the high number of teenage pregnancies. While promoting sexual and reproductive rights is highly controversial in Chile, a more open debate about sexual education, contraception and abortion is essential to reduce the high level of teenage pregnancies and their detrimental impact on the life prospects of the girls involved. The Government has proposed a bill decriminalizing abortion where the life of the mother is at risk, the fetus is non-viable or the pregnancy resulted from rape. Lifting the blanket ban on abortion would be an important step, but this bill does little to address the problem of teenage pregnancies.[27]

42. Gender equality is almost never championed by institutions that are heavily male dominated. In all three branches of government in Chile, men are much better represented than women. There are still almost six times as many men as women in Congress and less than one in five of the judges of the Supreme Court and the Constitutional Court are female. The introduction of a quota system that requires at least 40 per cent of a party's candidates for Congress to be women is an important step forward. Such quotas have had a positive impact on the proportion of women in many national parliaments in Latin America.[28] But candidacy quotas do not, on their own, ensure equal representation and additional steps will also need to be considered.

43. Significant problems persist in terms of discrimination against lesbian, gay, bisexual, transgender and intersex persons. While the 2012 Anti-Discrimination Act was a landmark achievement in this regard, many lesbian, gay, bisexual, transgender and intersex persons still face discrimination on a daily basis at school, at work and when trying to access basic services, such as health care and housing. The unacceptable discrimination and violence they encounter also makes it more likely that they will end up living in poverty. And those who come from poorer socioeconomic backgrounds are often subject to multiple forms of discrimination, thus making it extremely difficult to lift themselves out of poverty.

44. Transgender persons, particularly transgender women, often face the most severe forms of discrimination and other violations of human rights. Because of a lack of societal understanding and acceptance of transgender persons and the paucity of government policies and institutions to assist them, they are often forced to find work in the informal sector. Sex work may often be the only employment option effectively available to them, but this leaves them especially vulnerable to violence, diseases such as AIDS and unable to earn a steady income. The vulnerability of transgender persons is also reflected in a life expectancy of 35-40 years of age, compared to 79 in the country as a whole.

45. Deep discrimination against lesbian, gay, bisexual, transgender and intersex persons cannot be eliminated by legislative fiat alone and there is a need for concerted government policies to reinforce the legal commitment through education, resource commitment and policy changes. One fundamental step would be better data collection about the lesbian, gay, bisexual, transgender and intersex population. The CASEN surveys do not take account of sexual orientation or gender identity and the Government has not undertaken other comprehensive surveys or studies of this group, their socioeconomic situation or the nature and extent of violence and discrimination against them. Such data is an essential

[27] Alternative report submitted to the Committee on Economic, Social and Cultural Rights at its fifty-fifth session for the consideration of the fourth periodic report of Chile (June 2015), para. 97. Available at http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/CHL/INT_CESCR_CSS_CHL_20163_E.pdf.

[28] See ECLAC, "Compacts for Equality", p. 104.

foundation for the development of coherent government policies addressing the needs of lesbian, gay, bisexual, transgender and intersex persons.

46. The absence of an institution specifically tasked to protect and promote the rights of lesbian, gay, bisexual, transgender and intersex persons is also a critical gap. No government entity is responsible for enforcing the Anti-Discrimination Act and the National Service for Women has not embraced the rights of transgender women as part of its agenda. Given the nature and depth of the discrimination involved, appropriate institutional arrangements are indispensable.

47. Furthermore, the right of transgender persons to change their name and gender identity should be protected by law and put into effect through simple civil procedures. While the bill on gender identity that the Senate initiated in May 2013 was a positive step, the proposed procedures to register a change in gender identity were cumbersome and required judicial approval. Consideration of this bill appears to have stalled and human rights groups have expressed concern that the new Chair of the Senate's Human Rights Commission is opposed to the bill. The opposition of a single legislator should not be permitted to obstruct progress on a vitally important non-discrimination measure.

D. Labour rights, poverty and inequality

48. Chilean labour law, much of it a legacy of the Pinochet era, facilitates the maintenance of forms of economic inequality. Meaningful collective bargaining is made extremely difficult and the scales are consistently tilted in favour of employers. The right to strike is also unduly restricted. Under the Pinochet dictatorship, core labour rights were restricted, unions were segmented and union leaders were repressed.[29] The Pinochet years have weakened the power of labour organizations in Chile and the effects are still apparent today.

49. The Bachelet Government has proposed reforms to strengthen the bargaining power of trade unions, including by prohibiting non-union negotiating groups, extending collectively negotiated benefits to non-union employees with their consent and allowing unions to represent and collectively negotiate on behalf of workers with fixed-term or project-related contracts, who are currently outside the scope of collective bargaining. The reform would prohibit employers from replacing workers in the event of strikes, although companies using outsourced workers would retain the possibility of replacing them. It also envisages a bipartite commission to review the definition of essential service sectors in which strikes are prohibited. A new compulsory arbitration procedure would be established in sectors where strikes continue to be prohibited.[30]

50. While these proposals would be important steps in the right direction, some trade union representatives and civil society organizations considered them to be insufficient and to fall short in terms of international labour standards. Currently, the right to collective bargaining exists only at the enterprise level and employers can choose whether or not to bargain with inter-enterprise unions. This provision remains intact under the proposed reforms. Another practice that undermines union organization is that of permitting firms to splinter by using multiple tax identities, thereby avoiding the thresholds that would require them to permit collective bargaining at the company level.[31] The proposed labour reform does not resolve the fundamental problem with this practice, as it still allows two or more

[29] See Contreras and Ffrench-Davis, "Policy regimes, inequality, poverty, and growth", p. 101.

[30] See OxResearch Daily Brief Service, "Chile: Labour reform will pass this year", 29 January 2015.

[31] Sarah Gammage, Thomás Alburquerque and Gonzálo Durán, "Poverty, inequality and employment in Chile", ILO Conditions of Work an Employment Series, No. 46 (2014), p. 16.

enterprises to be treated as a single employer only if they have a common business address and provide similar or complementary products or services, or if they have a common controller. Thus, it is still possible, for example, for a newspaper to bargain separately with its journalists, printers and administrators as though these groups constitute separate lines of business. The reforms also leave in place the requirement that strikes can only occur within the context of collective bargaining.

51. The legacy of the dictatorship, combined with excessively modest subsequent reforms, has severely weakened the trade union movement. As a result, unions are seen as organizations that can do little to protect workers. Current unionization rates of around 14 per cent represent a radical decrease from the pre-Pinochet era and are very low in comparison to other OECD countries. The percentage of contracts covered by collective bargaining agreements is also very low in comparison to other OECD countries. If Chile wants to tackle high levels of income inequality, it should strengthen the bargaining power of unions vis-à-vis employers by respecting core labour rights, including those protected under the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the ILO Right to Organise and Collective Bargaining *Convention*, 1949 (No. *98*), which Chile ratified in 1999.[32] While corporations may legitimately strive for a labour market that conforms to their needs, it cannot be denied that the balance of power between corporations and unions in Chile is tilted so much in favour of the former that corrections are necessary to create a more level playing field.

E. Indigenous rights, poverty and inequality

52. The rights of indigenous peoples are the Achilles' heel of the human rights record of Chile in the twenty-first century. The matters of contention are complex and wide-ranging and the solutions not straightforward. But there seems all too little preparedness to tackle them other than in a superficial way. Yet if the Government is serious about its commitment to ending extreme poverty and reducing inequality, indigenous policy must be an essential element in such efforts.

53. The fact that the State does not have a clear picture of the number of its indigenous citizens is symptomatic. It also impedes effective policy design and targeting and raises questions about consultation. In the 2002 census, the figure for the proportion of indigenous persons among the population was 4.6 per cent. The disputed 2012 census yielded a figure of around 11 per cent and the 2013 CASEN survey suggested 9.1 per cent. It is not contested, however, that poverty rates are especially high among indigenous peoples in Chile. In 2013, their income poverty rate was almost double that of the non-indigenous population (23.4 per cent compared to 13.5 per cent). The extreme poverty rate of the indigenous population, also measured by income, was exactly double that for the non-indigenous population (8.2 per cent compared to 4.1 per cent). In 2013, 27.4 per cent of the households with an indigenous head of household were living in multidimensional poverty, compared to 15.1 per cent of the non-indigenous population.

54. There exist profound inequalities between indigenous and non-indigenous groups. One study concluded that "income disparity between Chile's ethnic groups is … among the

[32] Reference is made to the 2012 report of the ILO Committee of Experts on the Application of Conventions and Recommendations, which contains a long list of requests of the Committee to the Government of Chile to improve the implementation of ILO Conventions Nos. 87 and 99 through amendments of its Labour Code. Available from www.ilo.org/ilc/ILCSessions/101stSession/reports/reports-submitted/WCMS_174843/lang--en/index.htm.

highest in Latin America".[33] There are many other inequalities between indigenous and non-indigenous groups in Chile. While 56.6 per cent of non-indigenous people aged 20 years and over have completed secondary education, the figure is only 42.8 per cent for the indigenous population.[34] In 2006, life expectancy was 77 years for non-indigenous people, compared to 65 for the indigenous population.[35] Lack of political representation is also a problem. In 2013, the Committee on the Elimination of Racial Discrimination expressed its concern about the low level of participation by indigenous peoples in public affairs (see CERD/C/CHL/CO/19-21, para. 16). Despite the fact that around 1 in 10 Chileans self-identifies as indigenous, there is not one indigenous member of Congress in Chile.

55. The response by the Chilean State to what is widely acknowledged as a problem of exclusion, marginalization and discrimination has been piecemeal and the State has been especially reluctant to address the major issues of concern. As a result, Chilean policies have been strongly criticized by a broad range of international bodies. The Committee on the Elimination of Racial Discrimination devoted an important part of its 2013 concluding observations to the marginalization of indigenous peoples (see CERD/C/CHL/CO/19-21). The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism highlighted problems faced by indigenous peoples in a compelling analysis in 2014 (see A/HRC/25/59/Add.2). There is no need to repeat here what was said and what other international bodies have said. Suffice it to add that no serious effort to eliminate extreme poverty in Chile can succeed without a concerted focus on the situation of indigenous peoples.

F. Rights of children

56. Chile ratified the Convention on the Rights of the Child in 1990, but significant gaps in the protection of children's rights persist. In the Constitution, no provision is made for the protection of children's rights nor is there yet a comprehensive law on the rights of children and adolescents. Many of the Special Rapporteur's interlocutors during the mission observed that a sufficiently resourced institutional structure to coordinate and implement children's rights is also lacking.

57. Children and adults face many of the same problems of poverty and inequality, but the former are more vulnerable and less able to deal with those hardships. Although indigenous and migrant children are among the most vulnerable groups in Chile, there is no comprehensive law or policy directly addressing their situation. Various experts to whom the Special Rapporteur spoke lamented the inadequacy of existing childcare and early childhood education facilities and noted that this works to exacerbate inequalities. While early childhood education is part of the Government's education reform package, there is a risk that it will be given a low priority.

58. Domestic violence against children is an alarming issue in Chile. UNICEF found that 71 per cent of children in Chile suffer some type of violence (physical or psychological) from their mother and/or father.[36] While children from all socioeconomic backgrounds face high levels of domestic violence in Chile, those from poorer backgrounds are more likely to suffer physical violence. This rapidly turns into a vicious circle, because

[33] Claudio A. Agostini, Philip H. Brown, and Andrei Roman, "Poverty and inequality among ethnic groups in Chile", ILADES-Georgetown University Working Papers (2008), p. 4.

[34] See ECLAC, "Compacts for Equality", p. 108.

[35] See ECLAC, "Pueblos indígenas y afrodescendientes de América Latina y el Caribe: información sociodemográfica para políticas y programas" (2006), p. 114.

[36] See Soledad Larraín and Carolina Bascuñán, "4th Study on Child Abuse" (UNICEF, 2012), p. 6.

child victims of serious physical violence also gain lower school grades and thus less likely to escape from situations of deprivation. The Special Rapporteur is not aware of specific government policies to address prevention of domestic violence against children.

G. Rights of migrants

59. Although the 2013 CASEN survey estimated that migrants form 2.1 per cent of the total population, the true figure is almost certainly higher given the reliance of CASEN on self-identification and self-reporting. Over 80 per cent of the migrants recognized in the survey came from other Latin American countries, most notably Argentina and Peru. Some are highly educated and well paid and earn up to three times more than an average Chilean-born national.[37] However, migrants in Chile are a diverse group in terms of socioeconomic status and the income gap between the poorest and the richest quintiles is significantly higher than for the Chilean population.[38] Migrants, particularly those in irregular situations, often face obstacles in accessing education, health care, employment opportunities and housing. It is concerning that 25.2 per cent of migrants recognized by the CASEN survey live in multidimensional poverty, a percentage that would be much higher if the situation of irregular migrants were taken into account.

60. Although Chile is now a major destination for immigration, there is a marked absence of coherent legislative frameworks and comprehensive policies governing the situation of migrants, let alone their rights. The Aliens Act of 1975, adopted in the early years of the dictatorship, is the only legislative framework that applies to migrants, but it is primarily concerned with border control and the prerogatives of the Ministry of the Interior. There is clearly a degree of political will to guarantee the human rights of migrants, as demonstrated by the ratification by Chile in 2005 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the adoption of the Presidential Instruction No. 9 in 2008, which sets out national migration policy founded on certain principles, including respect for migrants' labour rights, non-discrimination and the integration and social protection of migrants in the field of education, health and employment. However, these steps have not been translated into a binding legal framework. Although a draft migration law was prepared and considered by Congress in 2013, it appears that the process has stalled.

61. Instead of developing a legal framework, the Government of Chile has adopted a number of ad hoc administrative measures governing the access of migrants to various services, particularly education and health care. In the field of education, the Ministry of Education issued Instruction No. 07/1008 (1531) in August 2005, in which it seeks to promote the admission of all migrant children to primary and secondary schools.[39] However, a variety of factors hinder irregular migrant children's access to education, such

[37] Baltica Cabieses, Helena Tunstall and Kate Pickett, "Understanding the socioeconomic status of international immigrants in Chile through hierarchical cluster analysis: a population-based study", *International Migration*, vol. 53, No. 2 (2013), p. 310.

[38] Ibid.

[39] Office of the United Nations High Commissioner for Refugees, International Organization for Migration and UNICEF, *Los derechos de los niños, niñas y adolescentes migrantes, refugiados y víctimas de trata internacional en Chile. Avances y desafíos* (2012); see chapter 1, section 1.2, for an overview of the administrative measures related to access to education for migrant and refugee children (English translation available at www.unicef.cl/web/wp-content/uploads/doc_wp/WD%20The%20rigths%20of%20migran%20children.pdf). See also concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW/C/CHL/CO/1, para. 34).

as discrimination and the inability of migrant parents to produce documents required for admission. Children also need a national identity card number in order to have their grades registered in the system. This requirement effectively prevents irregular migrant children from pursuing their studies, as the number can only be issued to those with a student visa or a temporary residence visa.[40]

62. Similarly, various administrative instructions and agreements govern migrants' access to health-care services. For instance, Ordinary Decree No. 2284 of 2007 guarantees the right of regular migrants to register with the National Health Fund and the right of irregular migrants to access emergency health services in designated public health-care facilities or to be treated privately. The Ministry of the Interior and the Ministry of Health signed a cooperation agreement in 2007 to allow all migrant children access to public health-care services regardless of their migration status or that of their parents, guardians or legal representatives. With respect to pregnant migrant women in irregular situations, under circulars Nos. 1179 of January 2003 and 6232 of May 2003, their right to receive health care in health clinics and public hospitals during their pregnancies, childbirth and post partum is guaranteed. Notwithstanding these measures, significant barriers still exist for migrants in accessing health care in practice, reportedly owing to discrimination, a lack of awareness of these measures on the part of personnel in health-care facilities and the lack of identity cards.[41]

63. With respect to housing, reports indicate that migrants often live in overcrowded, unsanitary and unhygienic conditions.[42] According to the 2013 CASEN survey, 14.9 per cent of migrants live in medium to high situations of overcrowding, compared to 7.9 per cent of Chileans. Furthermore, 9.1 per cent of migrants live in a situation of critical overcrowding, compared to only 1.1 per cent for Chilean nationals. Migrants do not benefit from State housing subsidies, which require proof of five years of permanent residence.

IV. Conclusions and recommendations

A. Anti-poverty programmes and coordination

64. The Special Rapporteur urges the Government of Chile to adopt a comprehensive anti-poverty plan. It should be carefully targeted and well integrated and specifically address both poverty and extreme poverty. Even the adoption of the major reforms in education, pensions and entitlements that are currently being considered would not, in the absence of more targeted measures, assure sustained decreases in the proportion of the population living in poverty and extreme poverty.

[40] Red Chilena de Migración e Interculturalidad, "Informe alternativo: Chile, Convención internacional sobre la Protección de los Derechos de Todos los Trabajadores Migratorios y de sus Familiares", July 2011. Available from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCMW%2fNGO%2fCHL%2f15%2f8326&Lang=en.

[41] Ibid., sect. 7.2. According to this report, one of the most extreme cases concerned a young Peruvian woman, six months pregnant, suffering from gestational diabetes. In 2010, she was denied health care at a clinic in Arica as she could not present a residence certificate, which eventually contributed to symptoms of irreversible loss at eight months. See also Articulacion Feminista por la Libertad de Decidir, "Shadow Report to the UN Committee on the Elimination of Discrimination against Women". Available at www2.ohchr.org/english/bodies/cedaw/docs/ngos/AFLD_E_CEDAW53.pdf.

[42] See Red Chilena de Migración e Interculturalidad, "Informe Alternativo: Chile", section 7.3.

65. In addition to such a plan, there is a need for more effective mechanisms to coordinate the disparate poverty eradication programmes that currently exist. The Ministry of Social Development is unlikely to be able to achieve this on its own.

66. Given the crucial leadership role of Chile at the international level in championing the Social Protection Floor Initiative, it is disappointing that the country's own programme is not more developed. It is widely acknowledged that the existing Ethical Income Programme stops well short of achieving a true minimum income for all those in Chile living in poverty. The debate on a real minimum income programme needs to be revived.

B. Measures to tackle discrimination and inequality

67. The Special Rapporteur urges the Government of Chile to adopt a more systematic approach to promoting a broad and affirmative notion of non-discrimination and strengthening the institutional arrangements designed to give substance to the provisions of the Anti-Discrimination Act.

68. The Special Rapporteur further urges the Government of Chile to adopt legislation that does more than just recognize the principle of equal pay for the same work, but also recognizes the principle of equal pay for work of equal value. As long noted by ILO and the Committee on the Elimination of Discrimination against Women, more effective mechanisms are needed in order to implement this principle (under the Equal Pay Act (No. 20,348)).

69. Women remain overwhelmingly responsible for caregiving in Chilean society. This situation guarantees low rates of participation in the formal labour market by those carers. In addition to programmes designed to encourage the male population to take greater responsibility for caring, the Special Rapporteur recommends that there be greater investment in community care facilities and measures to give economic recognition to the work done by unpaid care workers be considered.

70. Women's work opportunities are severely undermined by the phenomenon of adolescent pregnancy, which remains at a very high rate in Chile, especially among the poorest. The challenge goes well beyond the current debate about access to abortion, as important as that may be. The Special Rapporteur recommends that a sustained effort be made to acknowledge and promote sexual and reproductive rights, both as a matter of human rights and as a necessary complement to labour market reforms.

C. Constitutional and institutional reform

71. President Bachelet has announced that a dialogue on constitutional reform will begin in late 2015. The Special Rapporteur urges the Government of Chile to ensure that the full range of economic, social and cultural rights are recognized in a revised constitution. The rights of particular groups such as women, children, persons with disabilities, lesbian, gay, bisexual, transgender and intersex persons and others should also be specifically recognized in the revised constitution. Recognition should also be accorded to the indigenous peoples of Chile and their rights.

72. The Special Rapporteur further urges the Government of Chile to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Right, which it signed in 2009 and which entered into force in 2013. Ratifying the

Optional Protocol will improve the protection of the economic, social and cultural rights of Chileans.

73. The Special Rapporteur recommends that the President ensure the establishment of a well-funded and well-staffed Office of the Under-Secretary for Human Rights. The resulting ministerial structure should ensure that economic, social and cultural rights are an integral part of its mandate and should receive attention equal to that given to civil and political rights. The human rights obligations of Chile extend far beyond remedying the historical violations of the dictatorship. The new Office of the Under-Secretary could also take the lead in ensuring systematic and coordinated follow-up to recommendations that emerge from international human rights bodies and should be empowered to report to Congress on what has been done in this regard.

D. Indigenous peoples

74. The Special Rapporteur strongly urges the Government to respect its obligations under the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169), which it ratified in 2008. ILO and most other observers do not consider that this is currently the case. The tendency of government officials to dismiss the relevance of the United Nations Declaration on the Rights of Indigenous Peoples on the grounds that it is not legally binding is simplistic and unhelpful. The Declaration represents an international consensus on an appropriate framework for dealing with these issues and its provisions must be taken into account in policy formulation. The Special Rapporteur recommends that the Government of Chile integrate the Declaration into its domestic legal system.

75. The Government of Chile should require the Ministry of Social Development to prepare, in consultation with all concerned groups, a comprehensive strategy for the elimination of indigenous poverty. There is, at present, no such integrated strategy. Addressing the issue of land rights is central to the elimination of indigenous poverty. But, until there is a major increase in the financial resources allocated for this purpose, stated commitments to resolve the land issue will remain entirely unconvincing.

76. The proposal to create a ministry for indigenous affairs is extremely important. Given the relatively short timetable envisaged by some for achieving this, there would seem to be a serious risk that inadequate attention will be paid to the need for the new ministry to have a structure and functions that are very different from those of other ministries. Meaningful consultation with indigenous peoples is indispensable in devising an approach that meets both international standards and the specific needs of the peoples concerned.

77. The lack of any representative in Congress of indigenous origin, despite the fact that around 10 per cent of the population is indigenous, is a symptom of highly unsatisfactory arrangements to ensure meaningful political participation by indigenous groups. The Special Rapporteur recommends that a formula be sought that will enable an appropriate level of representation in Congress. The Special Rapporteur also strongly recommends that the 2017 census should retain a question that permits the respondent to self-identify his or her ethnicity, including indigenous and Afro-descendant peoples.

78. The Special Rapporteur recommends that the handful of corporations that dominate the extractive, forestry and agricultural industries on the lands claimed by the indigenous people should adopt a set of human rights policies that conform, as a

minimum, to the requirements of the Guiding Principles on Business and Human Rights.

E. Lesbian, gay, bisexual, transgender and intersex persons

79. The Special Rapporteur urges the Government of Chile to collect accurate statistics about the number of lesbian, gay, bisexual, transgender and intersex persons in Chile, which task is a prerequisite to effective policy elaboration. The Special Rapporteur also recommends that future CASEN surveys and the census should offer an alternative to the male/female binary option. In addition, the registration of a change in gender identity should not require time-consuming, expensive and potentially problematic processes of judicial approval. Other States permit individuals to register their own status at civil registries.

80. The Special Rapporteur recommends that the Government should set up a specialized institution to examine, in consultation with the groups concerned, the full range of social and other policies that need to be reformed to take account of the specific needs of lesbian, gay, bisexual, transgender and intersex persons and to ensure equal treatment. Examples of problem areas include housing for transgender persons, the responsibility of an agency such as the National Service for Women for dealing with transgender women, and the facilities and medical treatments made available in prisons. In general, the Special Rapporteur recommends that all social programmes take account of sexual orientation and gender identity implications.

F. Children

81. The rights of children and adolescents need to be more adequately recognized in the Chilean legal system, including through inclusion in a revised constitution and the adoption of a framework law. The Special Rapporteur recommends that a special entity with sufficient resources and power to coordinate the Government's policies addressing the situation of children be established.

82. The Special Rapporteur urges the Government to prioritize the reform of early childhood education policies and programmes as part of its planned education reform package.

83. The Special Rapporteur recommends that the Government adopt a nationwide policy to tackle domestic violence against children. The task is urgent, given the scale of this problem in Chile.

G. Migrants

84. The current protection of the human rights of migrants is ad hoc and there is a critical need for a comprehensive overhaul of the law and policy. In addition to the lack of a legal framework, the absence of a ministry specifically responsible for migration contributes to the gaps in the protection of migrants' rights. The Special Rapporteur considers it crucial to ensure that the migration bill, which is once again under consideration, clearly spells out the human rights of all migrants in accordance with international human rights law and standards and creates a separate ministry mandated to uphold these rights.

H. Bajos de Mena

85. Neighbourhood leaders in Bajos de Mena (Villa San Guillermo) claim to have repeatedly requested that authorities undertake a thorough survey of the health status of the population, but no comprehensive and systematic survey has been done. Given the extent of the problems reported, the Special Rapporteur urges the local and national authorities to undertake such a survey as a matter of urgency.

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Report of the Special Rapporteur on extreme poverty and human rights on his mission to Romania

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Special Rapporteur on extreme poverty and human rights on his mission to Romania from 2 to 11 November 2015. The Special Rapporteur found that, while Romania has made great progress since the Communist era in eradicating poverty, today it lags behind almost all other European Union countries in most measures of poverty and social exclusion. This is particularly problematic given the view of most observers that it has the fiscal space to do much more if the political will existed. Many Romanian officials are in denial about the extent of poverty and especially about the systemic and deep-rooted discrimination against the extremely poor, particularly the Roma, as illustrated by cases of forced evictions and police abuse. The report examines in detail the alarming levels of poverty and social exclusion faced by Roma, children in rural areas, and children and adults with disabilities. It finds that Romania's social security system, based on a "social safety net" approach and heavily oriented towards cash benefits, is problematic and treats social protection as a charitable undertaking rather than a right. Other problems include a tax policy that underpins unduly low levels of social spending, a lack of technical expertise in key ministries, and the decentralization of responsibilities unmatched by the provision of adequate resources. The Special Rapporteur's recommendations include official acknowledgement of the extent of continuing discrimination against Roma, the collection of disaggregated data on ethnicity in order to devise effective measures of redress, effective domestic implementation of the Convention on the Rights of Persons with Disabilities, increased social spending and social services, and the implementation of necessary institutional reforms.

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Report of the Special Rapporteur on extreme poverty and human rights on his mission to Romania*

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* Circulated in the language of submission only.

I. Introduction

1. Pursuant to Human Rights Council resolutions 8/11 and 26/3, the Special Rapporteur on extreme poverty and human rights conducted a visit to Romania from 2 to 11 November 2015. The purpose of the visit was to gather information and engage in a dialogue on the situation of poverty and social exclusion in Romania, specifically focusing on Roma, children and persons with disabilities, and to offer constructive recommendations to the Government and other stakeholders.

2. The Special Rapporteur is very grateful to the Government for its full and comprehensive support during his mission. He met with: the Ministers of Education and Research, European Funds, and Regional Development and Public Administration; the State Secretaries of the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of the Interior and the Ministry of Education and Research; the Deputy Head of the General Inspectorate of the National Police; the President of the National Authority for the Protection of Children's Rights and Adoption; officials of the National Authority for Persons with Disabilities; the President of the National Agency for Roma; officials of the Ministries of Health, of Labour, Family, Social Protection and Older Persons, and Finance; and representatives of the General Inspectorate of the Romanian Gendarmerie. At the Chamber of Deputies he met with members of the Committee on Human Rights, the Committee on Education and the Committee on Labour. He also met with the President of the Constitutional Court, the Ombudsman, the President of the National Council for Combating Discrimination, and the Director of the Romanian Institute for Human Rights.

3. The Special Rapporteur conducted field visits to Cluj-Napoca and Bacau county, where he met with local authority officials, civil society representatives and people living in poverty. In Bucharest, in addition to meeting the national authorities, the Special Rapporteur engaged with the Directorate for Social Assistance of Bucharest Municipality, visited two locations of Police Section 10 and met with people living in informal settlements in downtown Bucharest. In addition, the Special Rapporteur went to Prahova county, where he visited the Centre for Placement in Plopeni and the Centre for Rehabilitation and Neuropsychiatric Rehabilitation in Calinesti, and met with the Directorate for Social Assistance in Ploiesti.

4. The Special Rapporteur greatly appreciates the assistance given to him by various international organizations, including particularly the World Bank and the European Commission. He is also grateful to the non-governmental organizations, experts and academics who briefed him on issues relevant to his mandate and arranged invaluable opportunities to speak with persons living in poverty in Bucharest, Cluj-Napoca, and Bacau and Prahova counties. He is particularly grateful to the United Nations Children's Fund (UNICEF), which provided invaluable support throughout the visit.

II. Poverty and social exclusion in Romania

5. The Special Rapporteur concluded that many Romanian officials are in a state of denial about the extent of poverty and the systemic and deep-rooted discrimination against the extremely poor, especially the Roma. There is a continuing ethos in too many parts of government that resists transparency, consultation and accountability in relation to these issues. The facts are clear, however. On many poverty and social exclusion indicators, Romania ranks last in the European Union. Government services, especially, but not only, for the poorest, are generally the worst in the European Union. It must be acknowledged that Romania has made great progress in eradicating poverty since the fall of the dictatorship in 1989, but as a member State of the European Union with extensive resources available to it, it must now meet significantly higher standards.

6. The low ranking of Romania on almost all measures of poverty and social exclusion within the European Union has been exhaustively documented by that organization, the World Bank, UNICEF and a host of other observers. In 2014, 25.4 per cent of Romanians were at risk of income poverty and 40.2 per cent were at risk of poverty or social exclusion, the highest scores within the European Union.[1] In Romania, 26.3 per cent of the population is severely materially deprived, which is three times the European Union average and the second highest score in the European Union.[2]

7. Romania is also a highly unequal society. One of the most striking forms of inequality in the country is between urban and rural areas. The relative poverty rate is 3 times higher in rural areas than in urban areas and 10 times higher in the poorest region (the North-East) than in the richest region (Bucharest-Ilfov).[3] Relative poverty in Romania, measuring the rate of individuals whose household disposable income is below 60 per cent of national median income, has increased from 21.1 per cent in 2010 to 25.4 per cent in 2014.[4] The Gini coefficient, measuring income inequality, stood at 34.7 per cent in 2014, ranking Romania among the most unequal countries in the European Union.[5] Those at the bottom in Romania have very limited mobility. Among those in relative poverty in 2012, 81 per cent were in persistent poverty, meaning that they were at risk of poverty in the reference year and in at least two of the three preceding years.

8. But the extent of poverty, exclusion, inequality and well-being are better captured by adopting a multidimensional perspective rather than a narrow economic one. A study on multidimensional poverty in European Union countries found that 16.3 per cent of the Romanian population lived in multidimensional poverty in 2011, the highest rate among member countries.[6] A new composite Social Justice Index, which scores European Union countries on poverty prevention, equitable education, labour market access and other factors, ranks Romania twenty-seventh among those countries. Only Greece, in its state of despair, ranks lower on this index.

9. In the area of education, the Programme for International Student Assessment of the Organisation for Economic Co-operation and Development found that, in 2012, more than 37 per cent of 15-year-old Romanian students scored below proficiency level 2 for reading, mathematics and science and are thus considered functionally illiterate. In 2014, 18.1 per cent of Romanians aged between 18 and 24 had not gone beyond lower secondary education and were not in further education or training, compared to an European Union

[1] Statistics available from http://ec.europa.eu/eurostat/web/products-press-releases/-/3-16102015-CP.

[2] Ibid.

[3] The World Bank, *Background Study for the National Strategy on Social Inclusion and Poverty Reduction 2015-2020* (2015), p. 31. Available at www.mmuncii.ro/j33/images/Documente/Familie/2016/SF_BancaMondiala_EN_web.pdf.

[4] National Institute for Statistics, relative at-risk-of-poverty rate by household type.

[5] Eurostat, "Gini coefficient of equivalised disposable income". Available from http://ec.europa.eu/eurostat/web/products-datasets/-/tessi190.

[6] European Commission, Joint Research Centre, *Monitoring Multidimensional Poverty in the Regions of the European Union* (2014), p. 99. Available from: https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/monitoring-multidimensional-poverty-regions-european-union.

average of 11.2 per cent.[7] Romania also has the second lowest rate of tertiary education attainment in the European Union.[8]

10. Health statistics also paint a bleak picture. Recent policies have favoured hospital funding at the expense of urgently needed improvements in primary, community and preventive care arrangements. Accessibility to health-care services is especially poor in rural areas. Romania has the highest infant mortality rate in the European Union,[9] and the rate is particularly high in rural areas. Corruption in the health sector remains rampant, with an estimated 28 per cent of Romanians visiting public health facilities having had to offer what amounts to a bribe to get services.[10] This is almost six times the European Union average.

11. In housing, the number of units of social housing available and planned between now and 2020 is radically below the level of need. In Bucharest alone, there is a waiting list of approximately 10,000 persons, compared to a highly optimistic estimate that 4,000 units will be built in the next four years. That waiting list, however, does not reflect an estimated additional 10,000 persons who have not bothered to apply or who have given up. There is no national plan to address this chronic shortage and the criteria that are used in practice to allocate available housing clearly do not privilege the worst off. The Special Rapporteur met many people living in dire poverty who recognized that they would never qualify for social housing because of the restrictive criteria applied. In 2012, the highest rates of overcrowding in the European Union were observed in Romania, with 51.6 per cent of the population living in an overcrowded dwelling, compared to an European Union average of 17 per cent.[11]

III. Poverty and social exclusion among specific groups in society

A. Roma

12. The official state of denial about poverty and inequality in Romania is most striking when it comes to the Roma population. According to a 2011 study by the European Union Agency for Fundamental Rights, 78 per cent of Roma have a disposable household income below the national at-risk-of-poverty threshold, which was twice as high as for the non-Roma population.[12] The European Commission found in 2014 that 84 per cent of Roma

[7] Eurostat, "Early leavers from education and training by sex". Available at http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=t2020_40&plugin=1.

[8] The rate of tertiary education attainment was 25 per cent in 2014, slightly above 23.9 per cent of Italy. Eurostat, "Tertiary educational attainment by sex, age group 30-34". Available at http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=t2020_41&plugin=1.

[9] According to Eurostat, Romania had 9.2 deaths per 1,000 live births in 2013, which is the highest rate in the European Union, though other estimates suggest as high as 11. See UNICEF data, available at www.data.unicef.org/countries/ROU.html.

[10] European Commission, *Special Eurobarometer 397: Corruption* (2014), p. 8. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_397_en.pdf.

[11] Figures available from http://ec.europa.eu/eurostat/statistics-explained/index.php/Housing_conditions.

[12] European Union Agency for Fundamental Rights, *Roma Survey – Data in focus - Poverty and employment: the situation of Roma in 11 EU Member States* (2011), p. 35. Available at http://fra.europa.eu/sites/default/files/fra-2014-roma-survey-employment_en.pdf.

households reported a lack of water, sewage or electricity.[13] According to the World Bank, about 90 per cent of Roma households face severe material deprivation compared to 54 per cent of non-Roma living in adjacent areas.[14] The maternal mortality rate, the rate of women dying during pregnancy or shortly after giving birth, is 15 times higher for Roma women than for non-Roma women. A 2013 survey by the European Roma Rights Centre found that Roma, on average, die 16 years earlier than the rest of the population.

13. The striking poverty among Roma and the inequality between Roma and non-Roma correlates with societal attitudes towards Roma and government (in)action. In 2014, the World Bank concluded that growth alone is not enough to achieve significant poverty reduction among Roma, "as they face discrimination [and] are often excluded from sharing the benefits of growth".[15] It noted that 26 per cent of Roma households reported discrimination, compared to just 3 per cent in the non-Roma population,[16] figures that closely mapped the findings of a 2011 survey by the European Union Agency for Fundamental Rights.[17]

14. Yet, despite such statistics, senior officials to whom the Special Rapporteur spoke asserted that "there is no discrimination against Roma in Romania" and that they "live exactly as they want to live". Others described how the "Gypsies" are generally criminals who do not like to work, are "a nomadic people" and never send their children to school. Most stereotypes conceal a grain of truth and it is true that unemployment figures for Roma are higher than for the rest of the population, that a higher percentage of Roma children are out of school altogether or have dropped out and that Roma have a low level of property ownership. But that is not because Roma are by nature unwilling to work or follow an education, but because of a long and continuing history of discrimination, neglect and isolation.

15. Reliance upon patently inaccurate statistics is an important part of the equation. The 2011 census recorded only 621,573 Roma in Romania, although it is almost universally recognized that the actual figure is somewhere between 1.5 and 2.5 million. The census recorded 24,000 Roma living in Bucharest, a figure that is by every account a radical underestimate.

16. This confusion is abetted by government officials who regularly assert that the State cannot collect data that distinguishes between Roma and non-Roma, whether in education, health, employment or housing. Many officials insisted that, under article 7 (1) of Law 677/2001 on the Protection of Individuals with Regard to the Processing of Personal Data and Free Circulation of Such Data, the Government is prohibited from collecting ethnicity-disaggregated data. But this interpretation is both unwarranted and patently inconsistent with other official actions. Law 677/2001 implements a European Union directive, and provides, as does the directive it implements, various exceptions to the prohibition on the processing of personal data related to ethnic or racial origin. It provides, for example, that such processing is allowed when it is based on a specific legal provision protecting an important public interest, and relevant safeguards are applied. Despite the persistent invocation of the official denial, the Government manifests no hesitation in collecting

[13] European Commission, Assessment of the 2014 national reform programme and convergence programme for Romania (SWD(2014) 424 final), p. 20.

[14] The World Bank, "Country Program Snapshot", April 2015, p. 5. Available at www.worldbank.org/content/dam/Worldbank/document/eca/Romania-Snapshot.pdf.

[15] World Bank, *Country Partnership Strategy for Romania for the period 2014-2017*, p. 11. Available from http://documents.worldbank.org/curated/en/2014/04/19552473/romania-country-partnership-strategy-period-fy2014-2017.

[16] Ibid.

[17] Data available from http://fra.europa.eu/DVS/DVT/roma.php.

ethnicity data in response to financial incentives, such as those attached to access to European funds.

17. At the behest of the European Union and other international bodies, the Government adopted the Roma Inclusion Strategy in 2015, but has shown absolutely no political will to implement it. The strategy floats in space, disconnected from relevant government policies; there is no clear budget for it other than external funds and no ministry or senior politician is keen to lead on the issue. The institutional difficulties compounding these problems are addressed in section IV below.

18. Among the many challenges facing the Roma, the present report focuses primarily on issues relating to housing and police abuse.

1. Housing

19. It is widely acknowledged, including in the Government's Roma Inclusion Strategy, that improvement of the housing situation of the Roma should be a priority and is integral to fighting poverty and social exclusion among this group. According to the World Bank, about 30 per cent of Roma households live in dilapidated houses or slums.[18] Many have no security of tenure and thus live under the constant threat of forced evictions, often to isolated areas, thereby reinforcing their social exclusion.

20. The Special Rapporteur visited Cluj, a Romanian city that has seen many forced evictions in recent years. One infamous case involved the eviction of people from Strada Coastei in December 2010, and another concerns the threatened eviction of some 140 people in central Cluj in the spring of 2016. Most evictees end up in the Pata Rât area.

21. The mayor of Cluj a former Romanian Prime Minister, showed the Special Rapporteur photographs to contrast the squalor in Strada Coastei before the evictions with the "model" housing to which the evictees were moved in Pata Rât. But the Special Rapporteur visited these units and found a dramatically different reality. Four or more family members lived in single rooms of about 16-18 square metres. The rooms are damp, poorly insulated and pervaded by the stench emanating from the adjacent garbage dump. Many children have "unexplained" rashes and stomach illnesses. Others who were moved to Pata Rât were even worse off. Many of the residents of Strada Cantonului and the Dallas settlement in the Pata Rât area had to build their own houses on land for which they had no formal title, with all of the uncertainty that results. Many do not have electricity, leading to primitive conditions in which, for example, children have to do their homework by candlelight.

22. Nationally, Roma live under the shadow of forced evictions as a result of their lack of property or lease documents combined with pressure on local governments to remove these "unwanted elements" from central areas. Romanian law offers few safeguards for people without formal tenure and the Civil Procedure Code explicitly denies protection to those who "occupy abusively, de facto, without any title, a house".[19] International human rights law, in contrast, provides that protection against forced evictions should not depend on a person's land tenure status, such as living in an informal settlement.[20] The result is that Roma families without formal tenure status are regularly subjected to forced evictions, involving little consultation and even less advance notice. Such evictions often take place in bad weather and without the provision of adequate alternatives.

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[18] The World Bank, "Country Program Snapshot", p. 5.

[19] Civil Procedure Code, art. 578.

[20] Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 25.

23. While many Roma live in inadequate and informal housing, the public housing system offers little relief. Not only is the existing stock of public housing in Romania completely insufficient, but Roma generally do not qualify for such housing. Roma are not listed in the Housing Law (Law 114/1996) as one of the categories of beneficiaries of public housing. Roma could qualify under a different category, but the housing criteria have been set by local authorities in such a way as to ensure the exclusion of most Roma, such as by giving priority to married couples, which effectively excludes many Roma couples who are in consensual partnerships. Law 116/2002 on preventing and combating social marginalization, which includes a section on housing, equally excludes Roma from protection in the area of housing.

2. Abuse by the police

24. The Special Rapporteur is deeply concerned by allegations of police abuse, especially against Roma. Several civil society organizations indicated that this is a widespread practice, although official figures are lacking. The case of Gabriel-Daniel Dumitrache is illustrative. He died in March 2014 in Bucharest after allegedly having been beaten up severely at Police Section 10 at Strada Stelea Spatarul 15. He was one of many "parking assistants", who "assist" drivers in parking their cars, an activity that is prohibited by law. Such informal work is common among Roma men in Bucharest, who are more likely to take up such irregular work due to very high levels of unemployment among Roma.

25. The Special Rapporteur spoke to several Roma men in Bucharest who worked as parking assistants and they described being regularly apprehended by the police, and sometimes subjected to physical abuse. On various occasions, after showing their identity cards, they were nevertheless taken to a police station, detained for significant periods of time and sometimes subjected to physical violence in isolated parts of the building. It was suggested that the police are under political pressure to "cleanse" the city of such informal workers, thus turning a social issue requiring economic and social solutions into a police matter.

26. In Bucharest, the Special Rapporteur visited the former and current headquarters of Police Section 10 at Strada Stelea Spatarul 15 and Bulevardul Unirii 72 respectively. Section 10 headquarters is the location to which many parking assistants are allegedly taken by the police for the purpose of identification and questioning. The police representatives maintained that Strada Stelea Spatarul 15 had never once been used for these purposes since the tragic incident involving Gabriel-Daniel Dumitrache, in March 2014. This claim was contradicted by explicit information received from civil society sources. According to the police, identification is normally carried out on the spot and only those who refuse to cooperate or who are aggressive, violent, emotional or otherwise not in a state to allow the officers to carry out identification and questioning on the street are taken into custody at Bulevardul Unirii 72. This claim appeared implausible, since Bulevardul Unirii 72 consisted of ordinary offices in which a number of civil servants were working and was not equipped with rooms and facilities to enable questioning in a manner that respects the dignity, privacy and confidentiality of concerned persons. In addition, standard procedures to discourage police violence were largely absent. The log of people brought to headquarters only recorded the time of arrival, not the time of departure; the video camera, which purportedly monitored access in and out of the station, belonged to the private owner of the building and the police had no independent access to the video footage; and there was no video surveillance anywhere inside the building.

27. Senior police representatives and Ministry of Interior officials expressed great confidence that abuses do not occur and that, in exceptional cases of abuse, the responsible police officers are properly disciplined or punished.

28. An important test of such claims is an effective and responsive complaints system. Many Roma victims of violence to whom the Special Rapporteur spoke said that filing a complaint would be both burdensome and futile. A victim complainant is first required to obtain a medical report from the National Forensic Institute. But there are few laboratories of the Institute in Romania and only one in Bucharest. Even if complaints are filed, they are unlikely to lead to the sanctioning of perpetrators. Non-governmental organizations have reported that, between 2012 and 2014, 3,034 complaints were submitted to the Office of the Prosecutor alleging abusive behaviour by the police.[21] Only 14 of those complaints led to prosecution and in only 4 cases were police officers convicted for abusive behaviour. It may well be, as a senior police officer informed the Special Rapporteur, that the allegations of abuse are exaggerated, but the extent of the problem is clearly much more dramatic than officials were prepared to acknowledge. A system made deliberately complex and intimidating that yields a successful prosecution rate of 0.13 per cent of all complaints clearly needs to be fixed.

29. The combination of persistent and credible allegations, a lack of the most basic procedures to deter abuse and an ineffectual complaints system underscores the urgent need to introduce stricter rules, provide vastly more transparent figures, undertake regular reporting and establish a meaningful complaints procedure. There is nothing peculiar about police violence, which is a universal problem. What is peculiar about the Romanian situation is that the rules that currently apply could be seen as a charter for harassment. The system includes characteristics that make abuse easy and ensure that accountability will be the rare exception rather than the norm.

B. Children

30. The levels of poverty, social exclusion and material deprivation from which children suffer in Romania are especially unjustifiable in an upper-middle income country like Romania. According to Eurostat, 51 per cent of all children are at risk of poverty or social exclusion, which is the worst score in the European Union.[22] Children are also vulnerable to the risk of severe material deprivation. Some 42.3 per cent of single-person households with dependent children and 47 per cent of households with two adults and more than three children suffer from severe material deprivation. These rates are alarmingly high compared to the European Union average of 20.1 per cent and 11.4 per cent, respectively.

31. Children in rural areas are especially likely to be poor in Romania. In 2012, the World Bank estimated that more than 74 per cent of all children living in poverty in Romania live in rural areas and the rate of child poverty is over three times higher in rural areas than in urban areas.[23] The absence of employment opportunities for parents in the formal labour market seems to be one of the main underlying causes for rural child poverty. Romania suffers from a high rate of in-work poverty, which is mostly concentrated in rural areas, mainly in the agriculture sector. The lack of employment in rural areas is so serious

[21] This includes alleged abuse against both Roma and non-Roma. See www.apador.org/sunt-abuzurile-politiei-descurajate-de-autoritati/.

[22] Eurostat, "People at risk of poverty or social exclusion, by age group, 2014". Available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion#Children_and_active-age_people_more_at_risk_of_poverty_or_social_exclusion_than_elderly_people_in_several_countries.

[23] The World Bank, *Background Study*, pp. 31-32.

that between 82,000 and 350,000 children have been left behind by one or both of their parents who have moved abroad in search of employment.[24]

32. The education system is of special importance for those Romanian children living in poverty. But as explained in more detail in section IV below, Romania has very low levels of public spending on education. The national education budget is insufficient to cover all necessary education expenditures, thus transferring much of the burden in a decentralized education on to local authorities. This has also resulted in significant "hidden education costs" for parents, especially in areas with poorer local governments. While compulsory education is nominally free under Romanian law, parents often end up paying for school supplies, school uniforms and transport because poorer local governments pass these costs on to them.[25]

33. This disproportionally affects poorer families, especially those living in rural areas where local governments impose an even higher burden on parents. As a result, children living in poverty have a lesser chance of remaining in the school system, which is reflected in the statistics relating to school participation. Studies suggest that school dropout and early school leaving are negatively correlated with parents' education, household income, and school-related expenditure.[26]

34. The effects are seen at all stages of the education system. While Law 1/2011 on national education aimed to support early childhood education, the number of preschool facilities has not increased over the past five years or so. The number of kindergartens has dramatically decreased by over 90 per cent compared to 1996, largely due to the financial decentralization of these facilities and the poor quality of care they provide.[27] The participation rate of children aged between 0 and 3 years in early childhood care arrangements remains especially low at approximately 2 per cent, compared to a European Union average of 30 per cent.[28]

35. According to official statistics, the dropout rate in primary and secondary education was 1.8 per cent of students per year for 2011-2012.[29] The out-of-school rate, tracking children who are not enrolled in any school, is on the rise. The proportion of children not enrolled in primary school was 6.3 per cent in 2009 and almost doubled to 12.2 per cent in 2012.[30] The early school leaving rate, which measures the percentage of the population aged between 18 and 24 years that has attained, at most, lower secondary education and is

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[24] According to the National Strategy on the Protection and Promotion of Children's Rights 2014-2020, local public administration authorities recorded 82,000 children with at least one parent abroad as of 30 June 2013. However, independent research estimated the number to be much higher, in the range of 350,000. See Save the Children, *Child Poverty and Social Exclusion in Europe: A matter of children's rights* (2014), p. 24; Soros Foundation Romania, "The effects of migration: the children left at home (research summary)", available at www.fundatia.ro/sites/default/files/en_67_studiu%20engl%20miki.pdf.

[25] See Save the Children, *Child Poverty and Social Exclusion in Europe*, p. 18.

[26] European Commission, *Investing in children – Breaking the cycle of disadvantage: Romania* (2013), p. 30. Available from http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=2061&moreDocuments=yes&tableName.

[27] Ibid, p. 49.

[28] European Commission, *Key Data on Early Childhood Education and Care in Europe* (2014), p. 65. Available at http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/166EN.pdf.

[29] National Institute for Statistics, *Statistical Yearbook 2013: Education*, p. 301. Available at www.insse.ro/cms/files/Anuar%20statistic/08/8.%20Educatie_%20en.pdf.

[30] UNICEF, *Cost of Non-Investment in Education in Romania* (2014), p. 21. Available at www.unicef.org/romania/Cost.Noninvest.web.pdf.

not in further education or training, is 18.1 per cent, well-above the European Union average.[31]

36. These figures are even higher for vulnerable groups, including Roma children and children in rural areas. For Roma children, discrimination and negative stereotypes and the lack of sufficient support have been frequently cited as factors contributing to their lack of school attendance and high dropout rates.[32] According to UNICEF, only 82.4 per cent of Roma children of school age attend school; 6.9 per cent have discontinued their education, and 8.9 per cent have never been enrolled in the education system.[33] In rural areas, poor infrastructure and the long distances to school also hinder school participation.[34] In addition, children in rural areas may often need to participate in income-generating activities for their families and perform household duties, which are considered to be a "risk factor for school attendance".[35] According to the National Authority for the Protection Children's Rights and Adoption, the school dropout rate is higher in rural areas (2.1 per cent) than in urban areas (1.8 per cent).

37. Although not directly correlated, low school participation rates coincide with a high rate of institutionalization of children. According to official figures, there were 58,013 children in the "special protection" system (i.e. in the State's care) as of 30 June 2015. This was approximately 1.5 per cent of all children in Romania.[36] Of the total, 37,126 children were in family-care settings and 20,887 were either in public or private residential institutions. The overall number has not significantly declined over the past decade, although a larger proportion of children are now in family-care settings rather than institutions. It is especially problematic that 40 per cent of institutionalized children are in the special protection system for reasons related to poverty. This is because poor families are often persuaded to let their children be institutionalized so that they can be taken care of "properly".

C. Persons with disabilities

38. Romania ratified the Convention on the Rights of Persons with Disabilities in 2011. The importance of that step is not to be underestimated, but nor should the scale of the challenge that remains. Even the concept of "disability" in the Convention on the Rights of Persons with Disabilities is not consistently applied. Romanian authorities still refer to children as being "handicapped", having "special needs" or being "invalids". And HIV/AIDS and "rare disease" are classified as a disability. Such classifications are entirely incompatible with international standards. The lack of a consistent definition of "disability" undermines the authorities' ability to collect reliable data on the situation of persons with disabilities, leading to a lack of accurate and comparable data that could be used to design

[31] Eurostat, "Early leavers from education and training by sex".

[32] UNICEF and the United Nations Educational, Scientific and Cultural Organization (UNESCO), *Global Initiative on Out-of-School Children – Romania Country Study: Analysing the situation of out of school children in Romania* (2012), pp. 39-40.

[33] Ministry of European Funds, "Romanian Partnership Agreement for the 2014-2020 Programming Period", p. 33. Available at www.fonduri-structurale.ro/Document_Files/Stiri/00014830/sfvjd_Acord%20de%20parteneriat%20oficial.pdf.

[34] UNICEF and UNESCO, *Global Initiative on Out-of-School Children*, p. 41. See also World Vision Romania, The Child Well-Being in Rural Romania (2012), at 98, available at: http://www.worldvision.ro/_downloads/allgemein/The_Child_Wellbeing_Rural_Romania_EN.pdf

[35] UNICEF and UNESCO, *Global Initiative on Out-of-School Children*, p. 45.

[36] According to the National Institute for Statistics, the total number of children as of January 2015 is 3,734,667. See www.copii.ro/transparenta/statistici-page/.

adequate policies. The Special Rapporteur has also been informed that the official Romanian translation of the Convention on the Rights of Persons with Disabilities is inaccurate. For example, the translation of article 12, which guarantees the right of persons with disabilities to be recognized as persons with legal capacity on an equal basis with others, is narrowly interpreted as a right to legal assistance. In general, there appears to be a lack of political will to fully include persons with disabilities in Romanian society and to recognize their human rights. More generally, there is no strategic vision of their role in society, as illustrated by the fact that a new national disabilities strategy has been awaiting adoption for almost two years now.

39. Many of the difficulties that persons with disabilities in Romania face start early in life. Although Romanian law (Law 272/2004) protects children under the age of 3 from being institutionalized unless they have a "severe" degree of disability, civil society alleges that many such children are still institutionalized because they are wrongly diagnosed as having a severe disability.[37] Official estimates indicate that 723 children under the age of 3 live in placement centres.[38]

40. Officially, more than 70,000 children are considered to have some form of disability.[39] As of 30 June 2015, 7,025 of them, or roughly 10 per cent, were in the State's care, mostly in public or private placement centres.[40] The Special Rapporteur visited two placement centres, in Bacau county and in Prahova county, which accommodated children who were separated from their families for various reasons, including disability. In the centre in Prahova county, all the children reportedly have mental disabilities of varying degrees. However, only 22 of the 55 children at the centre had disability certificates. The rest were said to have "behavioural" problems or not to be "adaptable to mainstream schools". Children placed in residential institutions normally attend special schools attached to the institutions, where education is reportedly not of a comparable quality to mainstream schools. They often end up staying in the institutions until they become adults, at which point they may be transferred to institutions for adults.

41. In 2013, almost half of all children with disabilities were not enrolled in any type of school[41] and they were reportedly seven times more likely than other children to be without access to educational opportunities.[42] They are also said to be twice as likely as children

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[37] Mental Disability Rights International, "Hidden suffering: Romania's segregation and abuse of infants and children with disabilities". Available at www.driadvocacy.org/wp-content/uploads/romania-May-9-final_with-photos.pdf.

[38] National Authority for the Protection of Children's Rights and Adoption, "National Strategy on the Protection and Promotion of Children's Rights 2014-2020", p. 28.

[39] National Authority for the Protection of Children's Rights and Adoption, "The situation of children with disabilities 30 June 2015". Available at www.copii.ro/statistici/.

[40] National Authority for the Protection of Children's Rights and Adoption, "Statistical bulletin on labour and social welfare in the second quarter of 2015, Child Rights Protection", p. 9. Available at www.mmuncii.ro/j33/images/buletin_statistic/copil_sem_I_2015.pdf.

[41] Academic Network of European Disability Experts, Elena Tudose, "European semester country fiche on disability" (2014), p.18. Available from www.disability-europe.net/. The Commissioner for Human Rights of the Council of Europe, Nils Muižnieks, also noted that, according to official statistics, at the end of 2013 approximately 60 per cent of children with disabilities were included in mainstream education, while expert non-governmental organizations cast doubts over the accuracy of the data and indicated that the average share of children with disabilities registered in primary, lower secondary and upper secondary school in the mainstream education system was only 38 per cent. See Commissioner for Human Rights of the Council of Europe, "Report following his visit to Romania from 31 March to 4 April 2014", para. 58.

[42] European Centre for the Rights of Children with Disabilities, submission to the Committee on the Rights of Persons with Disabilities under paragraphs 26-29 of its working methods (early-awareness

without disabilities to drop out of school after attending four classes.[43] Parents of children with disabilities spoke of the strong resistance in mainstream schools to including children with disabilities and of pressure to transfer their children to special schools. And teachers in mainstream schools are generally not properly trained to teach children with disabilities.

42. In any event, the quality of education in special schools is reportedly poor and not adapted to the individual needs of children with different types of disabilities. And some children with multiple disabilities have reportedly been denied enrolment in special schools.[44] Since 84.9 per cent of special schools are concentrated in urban areas, children in need in rural areas are largely neglected.[45]

43. The low educational attainment of children with disabilities has a negative impact on their employability in the future.[46] According to the National Authority for Persons with Disabilities, the rate of employment among adults with disabilities aged between 18 and 65 years is estimated at 11.46 per cent. Law 448/2006 provides for various measures aimed at increasing employment of persons with disabilities, such as a quota and tax incentives for employers to hire persons with disabilities. However, the low percentage of persons with disabilities in employment indicates that these measures are ineffective. Even in the public sector, where the Government should set the right example, the numbers employed are low. While Law 448/2006 requires public and private employers with more than 50 employees to ensure that at least 4 per cent of their employees consist of persons with disabilities, no central authorities and only a few local authorities have reached that quota.[47]

44. Persons with a disability who are unemployed are often forced to rely on social benefits. The Government provides a monthly indemnity scaled to the degree of disability and a "personal complementary budget" to cover utility bills. It is widely recognized that these social benefits are insufficient. Even the highest monthly indemnity, paid to persons with severe disabilities, is reportedly 234 lei, plus the complementary personal budget of 106 lei. The total amount, which only adds up to over 300 lei is grossly below the monthly minimum wage and clearly unliveable. Many persons with severe disabilities, who are entitled to have a personal assistant employed by the local authorities, reportedly do not exercise this right, so that they can receive a monetary allowance instead and have a minimum level of income to live on. The low level of social benefits for persons with disabilities, combined with inadequate social services, often forces persons with disabilities and their families into poverty. Statistics show that 49.9 per cent of households with a person with disabilities aged between 16 and 64 are at risk of poverty, compared to the European Union average of 37.4 per cent.[48] Other forms of government help, such as social housing, are also inadequate for this group. While the Housing Law (Law 114/1996) obliges local authorities to give priority to persons with disabilities in allocating social

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and urgent-action procedures), footnote 19; Societatea Academică din România, "Diagnostic: Exclus de pe piața muncii – Piedici în ocuparea persoanelor cu dizabilități în România" (2009), p. 27, available at: http://motivation.ro/wp-content/uploads/2016/02/Diagnostic-exclus-de-pe-piata-muncii.pdf.

[43] Ibid.

[44] Madalina Turza, "The special education of children with disabilities in Romania (working paper)".

[45] Daniela-Anca Deteseanu, "Country Report on Romania for the Study on Member States' Policies for Children with Disabilities" (European Parliament, 2013), p. 27.

[46] A study has found that education is a more important factor than the degree of disability in increasing the chances of obtaining employment. Teodor Mircea Alexiu and others, "The labor market integration of people with disabilities in Europe and Romania: Literature and policy review report" (2014), p. 51. Available at www.e-qual-sec.ro/wp-content/uploads/2015/02/Report-1-disabled.pdf.

[47] Academic Network of European Disability experts, Elena Tudose, "European semester country fiche on disability" (2014), Task 5, p. 11.

[48] Ibid., p. 22.

housing and housing benefits, they often do not qualify for such help when they are unemployed.

45. The Convention on the Rights of Persons with Disabilities, domestic legislation and the European Union Disability Strategy 2010-2020 all emphasize the right of persons with disabilities to independent living. However, Romania still has high levels of institutionalization of adults with disabilities. While the deinstitutionalization of persons with disabilities has long been a strategic objective, all too few concrete measures have been undertaken to realize this goal. According to the authorities, at least 17,567 adults with disabilities still remain in residential institutions as of 30 June 2015.

46. The Special Rapporteur visited two residential institutions in Prahova county. At one, devoted to the recovery and rehabilitation of adults with mental disabilities, the Director made it clear that none of the residents is expected to ever recover and that no resident has been rehabilitated. The residents are thus destined to remain in the institutions until their death, with no prospect of community living. The institution that the Special Rapporteur visited is the rule rather than the exception. The management representatives of both residential institutions visited spoke of their interest in deinstitutionalizing their residents, but had concluded that it was not feasible due to obstacles such as opposition by local residents to including persons with disabilities in their communities and the lack of housing to accommodate such persons. It is also apparent that investments continue to be made to renovate and expand existing institutions, rather than build the infrastructures and services necessary to enable persons with disabilities to live independently.

IV. Anti-poverty framework of Romania

A. Deficiencies of the "social safety net" approach

47. Romania has an elaborate system of cash transfers. Some are universal, such as the State Child Allowance, the Child-Raising Benefit and the Indemnity for Disabled Adults. Others, such as the Guaranteed Minimum Income, the Family Support Allowance and the Heating Benefit are so-called means-tested programmes, targeted at poor people and made conditional on meeting certain requirements. At the insistence of the World Bank, which was the key actor in shaping the National Strategy on Social Inclusion and Poverty Reduction, the Ministry of Labour, Family, Social Protection and Older Persons is planning to bundle the three means-tested programmes into one called the Minimum Social Insertion Income. The plan is to increase the budget for this initiative from 1.2 billion lei in 2014 to 2.5 billion lei in 2017.

48. There is an unmistakable need to increase spending on benefits to increase the coverage of the poor and the benefits received per beneficiary, as the current means-tested programmes only cover between a quarter and a third of the poor. However, the emphasis on the so-called social safety net approach to social benefits, which seeks to narrowly identify and target the poorest and most vulnerable, is problematic. It undermines the status of social protection as a universal human right enshrined in multiple sources of international law, including the right to social security and the right to an adequate standard of living. It runs counter to the Social Protection Floors Initiative, which is firmly rooted in the human rights framework and aims to provide minimum guarantees of income security for all persons. The degree of selectivity and conditionality reflected in the new Minimum Social Insertion Income treats social protection less as a right and more as a charitable undertaking (see A/69/297). The most vulnerable are often the most likely to be excluded from the Minimum Social Insertion Income for failing to meet the prescribed conditions. One of those is a 95 per cent school attendance rate, but that will exclude those children

who, for valid reasons, are unable or reluctant to attend school. These concerns are reinforced by the European Commission findings in 2013 that the universal Child Allowance had more capacity to reduce poverty than the conditional Guaranteed Minimum Income.[49]

B. Reliance on social benefits and weak social services

49. The social protection system of Romania is "excessively oriented towards cash benefits",[50] at the expense of social services aimed at early interventions to prevent families from falling into poverty in the first place.[51] The European Commission notes that social services have been "largely ignored" and preventive services were the first to be cut during the financial crisis.[52] These are services to help people who need it most, such as incapacitated elderly persons living at home, families living in poverty who need assistance to keep their children in school and to access medical care or social housing, and children and adults with disabilities who require home-based care.

50. There is a severe lack of social workers and social services, with only 1 social worker per 3,350 inhabitants.[53] Over 60 per cent of those employed as social workers do not have appropriate qualifications.[54] Although Law 292/2011 requires every local government to establish public social assistance services and states that 1 social worker should provide services to no more than 300 beneficiaries, the reality is very different. The availability of social workers varies dramatically from one location to another. According to a World Bank survey, most rural communities only have one or two staff members on social assistance duties. But they are rarely professional social workers and they are expected to cover as many as 40 villages, often located far apart.[55]

51. A lack of financing is central to the problem of poor social services in Romania. Romania invests only about 0.6 per cent of gross domestic product (GDP) in social services, only about one quarter of the European Union average. The results, reflecting a combination of austerity and decentralization, are truly grim in many places. The County Directorates of Social Assistance and Child Protection, municipalities and non-governmental providers do not have sufficient funds to finance adequate social services. Social workers are underpaid, often receiving a salary close to the minimum wage, which is an impediment to attracting and retaining qualified workers. There is not enough professional training of social workers and those who are employed spend a disproportionate amount of their time doing office work. Only the allocation of more money from the central Government to local authorities to enable more social workers to be hired and paid a decent salary can change this situation. In Bacau county, the Special Rapporteur visited a project financed by UNICEF and Norway Grants, in partnership with the local authorities, that provides a minimum package of integrated social services in certain communities. The project shows that the provision of quality social services in rural areas, even in those with limited resources, is possible, but would require a financial commitment from the central Government.

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[49] European Commission, *Investing in children*, p. 26

[50] National Authority for the Protection of Children's Rights and Adoption, "National Strategy on the Protection and Promotion of Children's Rights 2014-2020", p. 10.

[51] See European Commission, *Investing in children*.

[52] Ibid., p. 15.

[53] The World Bank, *Background Study*, p. 119.

[54] Ministry of Labour, Family, Social Protection and Older Persons, "A Socioeconomic analysis for the 2014-2020 Structural Funds Programming Period" (2014).

[55] The World Bank, *Background Study*, p. 120.

C. Fiscal policy

52. Fiscal policy is central to efforts to eradicate poverty in Romania. Low levels of public spending perpetuate poverty and exacerbate inequality levels. Public expenditure on health care was only 4.3 per cent of GDP in 2012, the third lowest percentage in the European Union. But for 2015 the figure is apparently down to 4 per cent. In education, the European Commission estimates government expenditure at 3 per cent of GDP in 2012, the lowest figure in the European Union. The Minister of Education indicated to the Special Rapporteur that the current figure is around 4 per cent, but that would still be well below the European Union-average and very far from the 6 per cent goal set by article 8 of Law 1/2011. Each year since that target was legislatively adopted, its application has been suspended by the Government through an emergency ordinance. While increases have been proposed, there is concern that most will go to the tertiary sector, which has been relatively well protected from the dramatic cuts of earlier years.

53. Contrary to the assumption that low levels of social spending are unavoidable, economic statistics confirm that Romania has sufficient fiscal space to enable increased spending on anti-poverty measures. This was confirmed to the Special Rapporteur by the International Monetary Fund, which regretted that many opportunities for increased spending had been missed, including by using surplus budget funds to reduce the value added tax from 25 per cent to 19 per cent. This measure is less progressive than it appears, because many people living in poverty are part of the informal economy and thus pay very little value added tax. In other words, the dismal state of social spending is the result of deliberate policies that reduce funding that would otherwise be available, while channelling what is available to the better off in society.

54. Romania has also avoided increasing tax revenues to permit additional investments in education and other social sectors. With a flat-rate income tax of 16 per cent, Romania has one of the most regressive tax systems in Europe. This amounts to a political decision not to increase the net effective tax rate for individuals with higher incomes relative to those with lower incomes. In addition, effective tax collection rates are low and widespread tax evasion and corruption further reduce revenue intakes. Even in successful anti-corruption proceedings, the amount recovered from the proceeds of corrupt conduct is estimated to be as low as 5-15 per cent of the assets subject to a court order. This undermines the impact of sanctions and does not generate the appropriate revenues for the State. Moreover, Romania has only been able to make use of available European structural funds at a relatively low level, thus leaving much external revenues untapped. As of the end of January 2014, only 35 per cent of the European Union structural and cohesion funds had been claimed, the lowest absorption rate among member countries.[56]

55. Romania has adopted an essentially self-contradictory approach. On the one hand, it has, with the encouragement of external funders, adopted an array of excellent strategies designed to put in place the building blocks for a social democracy or welfare state. But on the other hand, the State's macroeconomic policies signal very different priorities. Some of the Special Rapporteur's interlocutors spoke of neo-liberal assumptions aimed at minimizing both taxation rates and social protection, while facilitating wealth generation without regard to redistribution. Instead of social or citizenship rights, the dominant discourse was one of equality of opportunity, as opposed to affirmative action.

[56] European Commission, Assessment of the 2014 national reform programme and convergence programme for Romania (SWD(2014) 424 final), p. 27.

D. Institutional challenges to eliminating extreme poverty

1. Technical capacity

56. There is a serious lack of technical expertise in at least some of the key ministries engaged in the fight against poverty and social exclusion. This has been compensated for by heavy reliance upon the policy analyses and prescriptions put forward by international organizations. This was evident in the preparation and adoption of the National Strategy on Social Inclusion and Poverty Reduction 2015-2020, which was largely driven by the World Bank. While the Bank has done excellent work, its dominant role has had the unintended consequence of narrowing the range of policy options considered and skewed them towards the problematic social safety net approach favoured by the Bank. The heavy reliance on international organizations and donors also means that line ministries miss opportunities to develop the essential administrative expertise and capacity to implement anti-poverty strategies and to fully "own" these strategies. International organizations compete with government ministries for skilled personnel, but by offering vastly superior salaries they are able to lure away talented Romanians who might otherwise have chosen public service.

2. Bureaucratic obstacles

57. The Roma Inclusion Strategy is an example of bureaucratic obstacles undermining optimal outcomes. The bodies responsible for implementing, coordinating and monitoring the strategy include: the National Contact Point for the Strategy, the Secretary of State of the Ministry of European Funds, the National Agency for Roma, the Interministerial Committee and Technical Secretariat to coordinate the different line ministries, and a counsellor on Roma issues in the Office of the Prime Minister. Their roles and respective responsibilities are unclear and result in a situation where no single body exercises the leadership necessary to achieve successful outcomes. There is also considerable confusion as to how the Roma Inclusion Strategy relates to the many other strategies prepared by various line ministries in areas such as poverty eradication, children's rights, health and employment. These bureaucratic obstacles are endemic in Romania and are also found outside the context of the Roma Inclusion Strategy.

3. Decentralization

58. In the 1990s, the Government of Romania began to decentralize to the county and local authorities the responsibility for public education and social services and benefits. While decentralization has much to recommend it in theory, the reality is that the county and local authorities are often not equipped with adequate financial and human resources to fulfil the resulting responsibilities satisfactorily.

59. Despite the decentralization of functions, financing mechanisms remain centralized. Local authorities heavily rely on the central Government to provide financing. The share of taxes over which local governments have full discretion on collection and use is among the lowest in the European Union.[57] In 2010, the share of local government expenditure covered by their own taxes was 11.2 per cent, which illustrates the magnitude of the dependence on transfers from the central Government.[58] Some stakeholders also pointed out that frequent legislative changes governing the level of revenues placed at the full

[57] International Monetary Fund, Romania (IMF Country Report No. 15/80), March 2015, p. 82.

[58] European Commission, *Report on Public Finances in EMU* (2012), p. 179. Available at http://ec.europa.eu/economy_finance/publications/european_economy/2012/pdf/ee-2012-4.pdf. See also International Monetary Fund, "Romania: selected issues", IMF Country Report No. 15/80, March 2015, p. 83.

discretion of local governments hinder effective planning at the local level and perpetuate dependence on the central Government.[59] The result is diminished public accountability and blame-shifting. When the line ministries in Bucharest are accused of not providing adequate social services and benefits, they blame the county and local authorities for their inability to ensure effective service delivery. The latter respond by claiming that the problems result from inadequate central Government funding.

V. Conclusions and recommendations

A. Roma

60. **The Special Rapporteur makes the following recommendations on Roma:**

(a) **The highest Romanian public officials should publicly acknowledge that there continues to be severe discrimination against Roma in Romania;**

(b) **Because of the depth and scope of past discrimination, special measures to assist the Roma population are needed in areas such as education, health care, employment and housing;**

(c) **The next census should be designed so as to provide an accurate picture of the Roma population. While the principle of self-identification should be respected by the State, several methods can ensure that interviewees feel free to identify as Roma. An identity card should not be indispensable and specially trained census-takers of Roma origin should be used in areas with a significant proportion of Roma. UNICEF and others have shown that social censuses can be undertaken in ways that allow Roma to state their ethnicity;**

(d) **In the absence of disaggregated data on ethnicity, it is impossible to devise effective special measures to assist specific minority groups, including the Roma, in employment, housing, education and health care. Law 677/2001 is compatible with the collection of such ethnicity data for statistical purposes, provided that relevant safeguards are in place. The National Council for Combating Discrimination should publicly acknowledge the importance of such an approach and publish a legal opinion on the interpretation of Law 677/2001. Although that law implements Data Protection Directive 95/46 of the European Union, the current official interpretation of the law appears to contradict article 8 (2) of the Directive and the European Commission should start an infringement procedure against Romania if it continues to misinterpret the Directive;**

(e) **Romanian law should provide adequate procedural safeguards against forced evictions, in conformity with international standards, including general comment No. 7 (1997) on the right to adequate housing of the Committee on Economic, Social and Cultural Rights. Eviction should be the last resort. The Government should instruct local authorities to prioritize the regularization of informal settlements over eviction. The Civil Code should be amended to apply to evictions from informal settlements, to allow for judicial review of such evictions and the granting of temporary or permanent stays of execution;**

(f) **Prefects are required to review the legality of all administrative acts by municipalities, including eviction orders. In reviewing the legality of eviction orders,**

[59] International Monetary Fund, "Romania: selected issues", p. 83.

they should take account of international human rights standards. The Ministry of the Interior should issue guidelines to this effect;

(g) Legislation on public housing, including the Housing Law (Law 114/1996) and Law 116/2002 on preventing and combating social marginalization, should be amended to include Roma as a category of priority beneficiaries in the allocation of social housing. The central Government should issue guidelines for local governments on the criteria for access to public housing to ensure the reasonable eligibility of Roma for such housing.

B. Prevention of police violence

61. The Special Rapporteur makes the following recommendations on prevention of police violence:

(a) All Romanian police stations should have CCTV cameras throughout the building, including in interrogation rooms. The Ministry of the Interior should publish clear guidelines on the installation of such cameras, how long video records should be kept, who has access to the records and under what circumstances;

(b) Individuals alleging police abuse should be able to proceed on the basis of a statement from any qualified physician, rather than requiring a very difficult-to-obtain certificate from the National Forensic Institute;

(c) Victims of police abuse currently have two options to file a complaint: with the superior officer at the police station or with the Office of the Prosecutor. The former option is unrealistic, because a victim of abuse is unlikely to complain at the police station where the abuse occurred. The latter option is unduly burdensome. Romania should set up a separate, fully independent, body to receive complaints. As stated by the Commissioner for Human Rights of the Council of Europe in his report following his 2014 visit to Romania (para. 205), such a body should be able, with the consent of the victim, to file a complaint with the Office of the Prosecutor. And it should publish yearly reports on the number of cases received, the nature of the complaints and the relevant characteristics of the victims (including, but not limited to, age, sex, ethnicity, race, colour, language, nationality and economic status).

C. Children

62. The Special Rapporteur makes the following recommendations on children:

(a) The Ministry of Education and Research should publish, including on its website, yearly statistics on school costs. These statistics should make clear, per school district, how much parents on average spend on costs such as school supplies, school uniforms and transport. The Ministry should also publish the number and nature of the complaints it receives relating to school costs for parents;

(b) The Ministry of Education and Research should ensure that the lack of identity documents, such as birth certificates, does not exclude children from accessing education. The process of issuing birth certificates should be simplified, so that it is a straightforward administrative procedure that can be undertaken on a free-of-charge basis;

(c) The Government should appoint a children's commissioner, with a broad mandate and power to protect children's rights. The commissioner's office should be adequately resourced and independent.

D. Persons with disabilities

63. **The Special Rapporteur makes the following recommendations on persons with disabilities:**

(a) **A definition of "persons with disabilities" that accords with the Convention on the Rights of Persons with Disabilities should be adopted and consistently used by all relevant authorities. The National Authority for Persons with Disabilities should be made responsible for the coordination and collection of comprehensive and accurate disaggregated data on persons with disabilities;**

(b) **The Government should ensure domestic legal implementation of article 12 of the Convention on the Rights of Persons with Disabilities, which guarantees the right of persons with disabilities to be recognized as persons with legal capacity on an equal basis with others;**

(c) **The Ministry of Labour, Family, Social Protection and Older Persons should review the national plan for deinstitutionalization and include in it specific targets for the number of community-based care facilities;**

(d) **The National Authority for the Protection of Children's Rights and Adoption should develop guidelines that narrowly define the meaning of "severe disability" in Law 272/2004 to prevent children under the age of 3 without such a "severe disability" being institutionalized. Such institutionalization should be the last resort, limited to a strictly defined category of children;**

(e) **The Ministry of Education should encourage inclusive education for children with disabilities and ensure that special schools are used only as a last resort. The current bill on the rights of children with disabilities is a welcome step forward and the Government should consider a mechanism to independently monitor minimum standards of accessibility and accommodation, and quality teaching adapted to the needs of children with disabilities in all mainstream schools;**

(f) **The Ministry of Labour, Family, Social Protection and Older Persons should more vigorously enforce the measures to encourage employment of persons with disabilities in Law 448/2006, including the quota system. The central Government should set an example by making sure that all public employers with more than 50 employees meet the quota of 4 per cent. The National Authority for People with Disabilities could start by becoming the first public employer to meet the quota.**

E. Social and fiscal policies

64. **The Special Rapporteur makes the following recommendations on social and fiscal policies:**

(a) **The Government should increase public spending on social services, education and health care to bring spending levels closer to European Union averages. In the area of education, it is important that the requirement on public spending in article 8 of Law 1/2011 is given due consideration;**

(b) **The Government should increase its tax revenues by moving away from its flat-rate income tax of 16 per cent and by improving tax collection rates and fighting tax evasion and corruption more seriously;**

(c) **The Government should improve its ability to absorb available European Union funds.**

F. Institutional reforms

65. **The Special Rapporteur makes the following recommendations on institutional reforms:**

(a) **The central Government and the county and local authorities should work closely together to identify and analyse the financial and human resources needed by the county and local authorities and allocate adequate resources to achieve specific social targets;**

(b) **The county and local authorities should provide better training for social services staff and invest more in recruiting and training community-based service providers, such as social workers, psychologists and counsellors;**

(c) **Consideration should be given to appointing a minister with specific responsibility for implementing the Roma Inclusion Strategy. The Ministry of European Funds might not be the best place to locate such a coordinator, because it suggests that action on Roma issues need only occur when the European Union wants and funds it;**

(d) **Romanian authorities rarely ever speak in terms of the State's human rights obligations when talking of poverty-related issues. They should make greater use of the frameworks provided by recognition of the right to health, the right to education and so on;**

(e) **The existing panoply of institutions in the human rights field is problematic. None of them is sufficiently effective, their responsibilities overlap and they are underfunded. The Office of the Ombudsman has failed to carry out its responsibilities and the National Human Rights Institution has neither the degree of independence nor the capacity to carry out all of the required functions. The Government should take appropriate steps to reform the institutional architecture, with a view to ensuring independence, adequate funding, and effectiveness;**

(f) **The courts have contributed remarkably little to the implementation of the human rights treaty obligations of Romania, despite the superior constitutional status of those obligations. Judges, prosecutors and lawyers should be given appropriate training on international human rights law, and ensure that it receives due consideration in court decisions;**

(g) **Romania needs to devise procedures to ensure the systematic consideration of recommendations addressed to the Government by international human rights bodies. The existing system is ad hoc and ineffectual.**